IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6156

MALLIE LEWIS,

Appellant,

—v.—

CITY OF NEW ORLEANS,

Appellee.

APPEAL FROM THE SUPREME COURT OF LOUISIANA

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Chronological List of Relevant Docket Entries

January 3, 1970:	*Municipal Court.* Affidavits filed charging Mallie Lewis with reviling the police in violation of 828 M.C.S. Section 49-7 and resisting arrest in violation of 828 M.C.S. Section 49-2.
January 5, 1970:	*Municipal Court.* Defendant Mallie Lewis was arraigned and entered a plea of not guilty.
April 17, 1970:	*Municipal Court.* Defendant Mallie Lewis was tried for and found guilty of reviling the police and resisting arrest. Defendant moved for and was granted an appeal to the Criminal District Court.
April 20, 1970:	*Municipal Court.* Defendant Mallie Lewis moved to arrest judgment. The motion was denied.
October 29, 1970:	*Criminal District Court.* The appeal of Mallie Lewis was filed.
December 15, 1970:	*Criminal District Court.* The Court affirmed the conviction and sentence of the Municipal Court.
February 4, 1971:	*Criminal District Court.* Defendant Mallie Lewis filed a Notice of Intention to Apply for Writs and a Motion to Fix Time to Apply for Writs. Court granted the defendant until March 4, 1971 to file for writs in the Louisiana Supreme Court.
March 4, 1971:	*Louisiana Supreme Court.* Application for writs filed.
March 10, 1971:	*Louisiana Supreme Court.* Application for writs denied. Dixon, J. dissents from refusal being of the opinion that the ordinance is clearly unconstitutionally vague and overbroad and is an unlawful restriction upon freedom of speech.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

April 21, 1971:	*Louisiana Supreme Court.* Defendant filed Notice of Appeal to the United States Supreme Court and a Request to Certify and Transmit the Record.
April 21, 1971:	*Criminal District Court.* Defendant filed Notice of Appeal to the United States Supreme Court and a Request to Certify and Transmit the Record.
June 7, 1971:	*United States Supreme Court.* Appeal docketed, No. 70-5373.
June 26, 1972:	*United States Supreme Court.* Judgment is vacated and the case is remanded to the Supreme Court of Louisiana for reconsideration in light of *Gooding* v. *Wilson.*
July 27, 1972:	*Louisiana Supreme Court.* Mandate of the United States Supreme Court filed.
October 11, 1972:	*Louisiana Supreme Court.* Joint stipulation to submit case on briefs without oral argument.
November 6, 1972:	*Louisiana Supreme Court.* Final judgment and opinion affirming the convictions and sentences of Mallie Lewis. Justices Barham, Dixon, and Tate dissenting.
January 31, 1973:	*Louisiana Supreme Court.* Defendant filed Notice of Appeal to the United States Supreme Court.
February 1, 1973:	*Criminal District Court.* Defendant filed Notice of Appeal to the United States Supreme Court.
February 5, 1973:	*United States Supreme Court.* Appeal docketed, No. 72-615.
June 4, 1973:	*United States Supreme Court.* Probable jurisdiction noted.

MUNICIPAL COURT
CITY OF NEW ORLEANS

No. 110-895(A)

CITY OF NEW ORLEANS

v.

MALLIE LEWIS

AFFIDAVIT CHARGING MALLIE LEWIS WITH REVILING THE POLICE, JANUARY 3, 1970

STATE OF LOUISIANA
PARISH OF ORLEANS
CITY OF NEW ORLEANS

No. 007097
AFFIDAVIT/SUMMONS
Item No. A-2292-70

In the Municipal Court of the City of New Orleans, Louisiana the undersigned affiant
Police P. Berner Arrest Officer(s) _____
(print name)
Credit 307 Being duly sworn upon his oath states:

That on Sat the 3 day of January, 1970 at or about 6:00 PM.

Name Mallie Lewis (Defendant)
Residence 5515 Lafaye Street
Employer's Name & Address _____

City & State N. O., La.
Birthdate 8-18-26 Race C Sex F Age 43

Location of Violation Curie and Leon C. Simon District & Zone 3-R Located within the City of New Orleans, did then and there commit the following offense in violation of Ordinance No. 828 M.C.S., known as the Code of the City of New Orleans of 1956, as amended,

Section ——— or Ordinance No. 49-7 Section ———
Relative To:

Reviling the Police

Affiant avers that he has reasonable grounds to believe and does believe that the person named above committed the offense set forth contrary to the form of the Ordinance of the City of New Orleans, Louisiana in such case made and provided and against the peace and dignity of the same.

/s/ P. L. Berner, Jr. Badge No. 1212
Signature of Affiant

Sworn to and subscribed before me:

1-3-70 /s/ D. Sgt. Boudreaux
Police Supervisor

Date of Trial: 1-5-70 Time: 4:00 PM

SUMMONS

You, Mallie Lewis defendant are hereby ordered to appear personally before Division C of the Municipal Court, 727 S. Broad, on January 5, 1970, at 4:00 PM., without fail under penalty of fine and imprisonment

/s/ P. L. Berner, Jr. 1212
Police Officer Badge No.

Affidavit Charging Mallie Lewis With Resisting Arrest, January 3, 1970

STATE OF LOUISIANA PARISH OF ORLEANS
SECTION C

MUNICIPAL COURT

AFFIDAVIT

Item No. A-2292-70

Car No. 307 District 3 Zone R Arrest Credit #

BEFORE ME, the undersigned authority at
730 So. White
Location where sworn

New Orleans, Louisiana, personally came and appeared Police Officer Paul Berner Badge No. 1212 who, first being duly sworn, did depose and say that he has reasonable grounds to believe and does believe that on Saturday, the 3 day of January 1970 at or about 6:00 PM. Mallie Lewis defendant, who gave his name above and his birthdate 8-18-26 Race C Sex F Age 43 and his Address 5515 Lafaye Street and his employment Housewife Did at Curie & Leon C. Simon Located in the City of New Orleans, Parish of Orleans State of Louisiana, then and there wantonly and unlawfully violate Ordinance No. ———— of the Laws and Code of the City of New Orleans of 1956, as amended Section 49-2 Paragraph ————, relative to
Resisting Arrest
All against the peace and dignity of same

/s/ P. L. Berner, Jr.
Affiant's Signature

Sworn to and subscribed before me on the 3 day of January, 1970.

/s/ D. Sgt. Boudreaux
Police Supervisor

Judge ————————————————

SUMMONS

Therefore, you, the accused

Mallie Lewis

are hereby notified and summoned by the authority vested in the undersigned police officer to personally appear before Section "C" of the Municipal Court of New Orleans, La., 727 S. Broad St. on the 5 day of January 1970 at 4:00 PM. to be arraigned without fail; otherwise a warrant for your arrest may be sought all according to law, particularly L.S.A.C.CR.P. Art. 211.

/s/ P. L. Berner, Jr. Badge No. 1212
Police Officer

ORDINANCE 828 M.C.S. 49-7 (REVILING THE POLICE)

Section 49-7. *Cursing, etc., police prohibited.*

It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty. (Flynn's Digest 1896, art. 1363.)

* * * [Certificate Omitted in Printing] * * *

ORDINANCE 828 M.C.S. 49-2 (RESISTING ARREST)

Section 49-2. *Resistance unlawful.*

It shall be unlawful for any person, by word or action, to resist an officer or to incite, induce, suggest or otherwise persuade or attempt to persuade any person to resist an officer. (C.C.S., Ord. No. 18,142, § 2.)

* * * [Certificate Omitted in Printing] * * *

TRIAL TRANSCRIPT, APRIL 17, 1970

"MUNICIPAL COURT FOR THE CITY OF NEW ORLEANS"

* * * [Caption Omitted in Printing] * * *

Witnesses for the City: Patn. P. Berner
Patn. L. Sunseri
Witness for the defense: Joseph Lewis, Sr.
Attorney for defendant: Mr. Barry J. Portman

* * * *

Attorney for the City: Mr. Clayton J. Borne

* * * *

[Tr. 1] *Officer Paul Berner, witness for the City, duly sworn, testified:*

Atty. Borne:

Q. State your name.
A. Officer Paul Berner.
Q. Who are you employed by?
A. New Orleans Police Department.
Q. Did you have occasion on the third day of January 1970 to issue a citation to one Mallie Lewis and Joseph Lewis, Sr?
A. I did.
Q. Are these the two people before the bar?
A. Yes sir.
Q. Did this arrest take place in the City of New Orleans?
A. Yes sir.
Q. Tell the court the circumstances leading up to the issuance of these citations.
A. The time and date specified on the affidavits while cruising I observed in my rear view mirror of my car a truck apparently following me through the streets of New Orleans. I began to make several turns and went around the block but I kept the truck in view. Every time I made a turn this truck made one in an apparent attempt to follow me. I continued on my way and went to a parking lot and the truck continued instead of coming

into the parking lot. I back out and followed the truck and pulled him over at New York and Curie. I put it over the air I stopped this truck that was apparently following me.

Q. You put it on the air?

A. Yes sir over the police radio. I said I was getting out to talk to the people in the car. I got out and the driver got out the truck.

[Tr. 2] *Atty. Borne:*

Q. Which one?

A. The male defendant was the driver. We started walking toward each other and when we got close I asked the driver why he was following me. He said "what did you do then with my son." I said I didn't have his son. I asked him if he had a driver's license and to let me see it. I started looking and it was dark and he was using my headlights looking for his license. While doing that, the female defendant (who previously was in the truck) she came out and started yelling and screaming that I had her son or did something to her son and she wanted to know where he was. I said "lady I don't have your son and I am not talking to you. I am talking to this man and you can go sit in the truck." She said "you god damn m. f. police—I am going to Giarrusso to see about this." I said "lady you are going to jail—you are under arrest." She said "you're not taking me to jail" and she started to get back in the cab of the truck and I caught up to her while she was getting in the cab. I attempted to take her and she started fighting and swinging her arms.

Q. You had trouble subduing her?

A. Definitely. The fight continued and I got a hold on her. At this time the male defendant came across my back and I was struggling with both subjects. Officer Sunseri came over and removed the male from my back and the fight was over. The subjects were placed in the car and charged accordingly.

[Tr. 3] *Atty. Borne:*

Q. You mentioned she asked where her son was. Had you ever seen this truck and these people previous to this?

A. Yes sir I had.

Q. What were the circumstances about her son?

A. I saw the truck at the fire station at Franklin and Mendez Streets. The circumstances involving her son were with another officer when he put her son under arrest because he was wanted under a capius from Civil District Court.

Court:

Q. You had nothing to do with it?

A. No. I had nothing to do with it aside from the fact I helped the man with the paper work at the scene. He wasn't sure what to do.

Q. It wasn't your arrest?

A. No sir it wasn't.

Q. You can identify those two people as the parties you issued the citation to on that day?

A. Yes sir.

Atty. Portman:

Q. How long have you been employed by the New Orleans Police Department?

A. A little over three years.

Q. In that time have you ever been the subject of a complaint by a citizen?

Court:

That has nothing to do with this.

Atty. Portman:

It has something to do with it.

[Tr. 4] *Court:*

What?

Atty. Portman:

A continuous line of conduct.

Court:

That has nothing to do with this case. He didn't even arrest her son.

Atty. Portman:

The testimony showed he had something to do with the arrest. That was the reason why I asked this question. It is very clearly connected by the fact we have an affidavit here and the defendants are in court.

Court:

I don't agree with you.

Atty. Portman:

Each defendant will show Officer Brener conducted himself in a manner which was not only unconventional but quite possibly illegal. The defendants would like to show by his testimony his conduct at the place of arrest and his conduct with the defendants. I would like to show this by question and testimony of the officer.

Court:

You will have to show it.

Atty. Portman:

I reserve the question.

Court:

This is what we are talking about right now. It wouldn't matter if he made 1500 illegal arrests as long as this one is legal.

[Tr. 5] *Atty. Portman:*

Q. Are you aware an administrative complaint was filed with Supt. Giarrusso concerning your conduct?
A. I am well aware of it.
Q. What was the reason?
A. I don't have the slightest idea the last I heard of it. I made a statement.

Atty. Borne:

That has no regard to this case.

Atty. Portman:

I clearly has regard to this case.

Court:

I am not trying that.

Atty. Portman:

Q. I have your affidavits with regard to the defendants and as far as Mallie Lewis and the location and street number of the arrest—Curie and Leon C. Simon. With regard to the affidavit on the defendant Joseph Lewis, Sr. the location of the arrest is Curie and Pasteur. Can you explain the discrepancy?

A. I have to look at the affidavits. This is strictly a mistake on my part. It should have been Curier and New York. It runs about a half block off Leon C. Simon. I thought it was still Leon C. Simon.

Atty. Portman:

I would like to move that the affidavit be stricken. It doesn't conform to the testimony and sworn statement of the officer. It doesn't conform to the affidavit sworn to and issued by him.

[Tr. 6] *Atty. Borne:*

The city objects and moves to amend which it has a right to do.

Atty. Portman:

Q. You testified that you had been at the scene of the arrest of the son of the defendants. Is that correct?

A. Yes sir.

Q. Where was that arrest made?

A. The arrest was made to the best I can remember in the 2600 or 2700 block of Prentiss.

Court:

The officer already testified he didn't have anything to do with it. He was just helping write a report. This is not the subject before the court. There is no necessity to build up a record.

Atty. Portman:

I would like to tell the court why. The reason I am bringing this line of questioning is that the defendants

will show by the testimony that Officer Brener gave the defendants permission to follow the police car to central lockup and because he refused or the other officer making the arrest of the son refused to tell them why their son was being arrested.

Court:

He didn't have anything to do with it. We are not trying that. He didn't accuse them of a violation by following—the thing I understand before the court is that she reviled the police and resisted arrest.

Atty. Portman:

I would like to reserve the right to call Officer Brener to the stand when the defendants present their case in chief. We are going through cross-examination now.

[Tr. 7] *Court:*

It has nothing to do with this case.

Atty. Portman:

It is relevant.

Court:

What difference does it make. She is charged with doing something she did when she met him.

Atty. Portman:

In order to resist arrest it must be a lawful arrest.

Court:

She reviled the police. That's what the arrest is based on. Under resisting arrest and reviling the statute states the officer should be acting in the performance of his duty. The defendant contends the officer was not acting in the performance of his duty.

Court:

Will you tell me what he was doing if not his duty?

Atty. Portman:

I will show by testimony and laying a predicate for

my questions by asking the officer about his prior activity with the defendants.

Court:

He didn't have any.

Atty. Portman:

You didn't give me a chance.

Court:

If you can prove it and tell me the truth you would have to tell me he had something to do with the defendants. He was by himself riding in a car. How could he?

[Tr. 8] *Atty. Portman:*

He stated he was at the scene. That showed he knew the defendants prior to the time he arrested them. May I continue?

Court:

No. I don't follow that. I am trying to get at this point now. If you can tell me what it is going to lead to where he makes or doesn't make a legal arrest I am interested.

Atty. Portman:

He didn't make a legal arrest. I am trying to show the reason by the defendants who were at the particular place they were arrested and the reason why they were stopped. The defendants were acting according to police instructions. Officer Brener has knowledge of that fact.

Court:

I don't want to deny you of anything I just can't see the connection.

Atty. Portman:

Q. What time did Officer Brener—

Court:

That's immaterial. Do you want to know whether or

not he knew anything about their son's arrest? Is that the question.

Atty. Portman:

It's not immaterial. The testimony will show their son was held in a police car on the street for an hour and a half.

Court:

He didn't hold him.

[Tr. 9] *Atty. Portman:*

He was part of a group.

Court:

We are getting so far away from this case. I don't see any sense in it.

Atty. Portman:

May I call Officer Brener as a witness after the defendants testify. Perhaps you can see it clearer at that time.

Court:

I won't let anyone else testify about the son. That is one incident and we are trying another incident.

Atty. Portman:

They are related. I want to show it by my questioning.

Court:

We will concede there was a prior incident. These people were told to follow that officer. You get your information from him. That is a fact I will concede. That doesn't give these people a right to revile him when they get to see him.

Atty. Portman:

I am not conceding the fact the defendants did revile the police.

Court:

I am trying to decide that.

Atty. Portman:

Under unlawful arrests, City of Monroe vs. Dugas R.S. 14 we have clear law—reasonable resistance to an unlawful arrest by person or persons arrested. There is a case as to the husband helping him wife. There can be no lawful charge of resisting arrest if the arrest was unlawful.

[Tr. 10] *Court:*

Prove the person didn't revile the police. That's the whole case.

Atty. Portman:

It is not necessary to show the defendant did not.

Court:

How can you not show it and say it wasn't a lawful arrest.

Atty. Portman:

In order to be arrested you must show probably cause for a felony.

Court:

Not necessarily a felony—a misdemeanor.

Atty. Portman:

The officer didn't testify to a misdemeanor.

Court:

He was reviled and called names when he said he didn't know about her son and she said he wouldn't tell her.

Atty. Portman:

He didn't state any misdemeanor. It was the defendant's truck that was stopped.

Court:

He didn't arrest him for a traffic violation. He arrested him for what happened after—why someone was

following him around and anyone has a right to know that.

Atty. Portman:

The testimony I am going to try to get from the officer is why they were following him around.

[Tr. 11] *Court:*

It doesn't make any difference. They didn't do anything by following him around but the question is he stopped them to find out what they wanted. Then they committed the offense he alleged.

Atty. Portman:

The testimony will show there was no necessity for the officer stopping the defendant's car.

Court:

Why not? How else were they going to communicate with each other? Continue with the case.

Atty. Portman:

Q. You say you first saw the defendant following you?
A. When I left the scene at the fire station helping the other officer with his paper work.
Q. I have here a city map and ask you to trace a line on the route you took.
A. I can't do that. I couldn't show the route I took by my automobile. This was in January.

Court:

Q. You admit the people caught up to you?
A. I pulled into a parking lot and allowed them to pass me up.

Atty. Portman:

They communicated previously.

Court:

You cannot say that they are trying to get in touch with him. He stopped them and the violation was committed in his presence according to his allegation.

Atty. Portman:

I reserve the right after you hear the testimony of the defendant to call Officer Brener back to the stand to question him as to prior circumstances.

[Tr. 12] *Court:*

If anything is warranted—yes.

Q. Then you made contact and they were apprehended at that particular place?

Atty. Portman:

I take an exception.

Q. For how many blocks approximately did the defendant follow you?

A. Approximately 15 blocks.

Q. How did you know they were following you?

A. I observed the headlights in my rear view mirror of my automobile and from the headlights it was apparent it was a pickup truck.

Q. How were you certain those headlights belonged to the defendant?

A. I am not certain. I stated I had a truck following me that would turn when I made a turn. At one time I would pull over to the side of the road and the truck pulled over and wouldn't pass me and wouldn't approach me.

Q. At what speed were you traveling?

A. Extremely slow.

Court:

I cannot possibly see any connection. What happened after they got together he told you.

Atty. Portman:

I take an exception to the ruling.

Court:

Q. You said you pulled into where?

A. A parking lot.

[Tr. 13] *Atty. Portman:*

Q. Did this belong to a particular business concern?

A. It was a parking lot for the Burger King.
Q. How long did you remain in the parking lot?
A. I pulled in and turned my car around and they passed and I pulled out. That's all I can tell you.
Q. Then what did you do?
A. I went after the car that was following me and stopped them.
Q. How many blocks from Burger King did you stop the car?
A. Approximately two.
Q. Why did you stop it?
A. To find out why they were following me.
Q. Is there a city ordinance against following a police officer?
A. No.
Q. Under what right of law did you stop the defendant?

Court:

That doesn't seem to the subject of this case.

Atty. Portman:

It is.

Court:

The subject is what took place as alleged in this affidavit.

Atty. Portman:

Following is not unlawful.

Court:

If someone is following you and you stop them to ask what they want that is the reason.

[Tr. 14] *Atty. Portman:*

Q. You stopped the car and you got out—is that correct?
A. Yes sir.
Q. Mr. Lewis got out of his?
A. Yes sir.
Q. What were your words to him?

A. I said "cap what are you doing following me." He said "I want to know what you did with my son." I said "I didn't have your son."

Q. What did you call him?

A. "Cap."

Q. Did you know him?

A. No I didn't.

Q. "Cap" is a familiar term?

A. A form of address.

Q. What manner of voice did you address Mr. Lewis?

A. What do you mean by manner of voice.

Q. Loud or what?

A. I don't think.

Q. Was it angry?

A. I don't think it was.

Q. Did you ask Mr. Lewis for his god damn driver's license. Did you use those particular words particularly the adjective modifying the noun.

A. I merely asked for his driver's license.

Q. You used no profanity?

A. Correct.

Q. You used no profanity in asking for that license?

A. No.

Q. Did you say "I'll teach you to follow cops all over the street?"

A. No.

[Tr. 15] *Atty. Portman:*

Q. There is nothing familiar to that?

A. No.

Q. Did Mr. Lewis say to you "you told me I could follow you to the central lockup?"

A. To the best of my knowledge I don't know.

Q. Do you recall anything familiar to that?

A. No.

Q. Did Mr. Lewis tell you what he wanted to do was find out where the officer took his son?

A. He got out the other side. He wanted to find out what they did with his son. I said I didn't have him.

Q. He said what you did or the other officer?

A. He used the word "I" did with his son. I said I didn't know.

Q. While waiting for Mr. Lewis' driver' license did you try to frisk him?

A. No.

Q. You didn't put him up against the truck?

A. No.

Q. You didn't check his pockets?

A. No indeed not.

Q. What were the first words Mrs. Lewis said to you?

A. He wanted to know what I did with his son.

Q. What did you reply to Mrs. Lewis?

A. To Mrs. Lewis?

Q. That was my question. I meant Mrs. Lewis?

A. I thought you said Mr. Lewis. You mean what she got out the truck?

[Tr. 16] *Atty. Portman:*

Q. That is right.

A. She was screaming and yelling something to the effect I had her boy and what I did with him. I said "lady I don't have your boy. I am talking to this man and you can go sit in the truck."

Q. You testified you grabbed her?

A. No sir.

Q. What did you do?

A. She did the next thing.

Q. What did she do?

A. She said "you g. d. m. f. police—I am going to see Giarrusso." I said "lady you are going to jail—you are under arrest." She tried to get in the truck. I ran around and attempted to get her out. Then the struggle started and during the struggle the male defendant jumped on my back and Officer Sunseri came to my assistance and it was over.

Q. Did you call her a black bitch or a black mother fucker?

A. No.

Q. You didn't call her that?

A. Definitely not.

Q. Did you use any profanity in talking with Mrs. Lewis?

A. No.

Q. Did you ever use the word "nigger?"

A. No.

Q. Where did you grab Mrs. Lewis? How did you handle her?

A. I attempted to grab her by the arm, body or any way, shape or form to subdue her to remove her from the truck.

[Tr. 17] *Atty. Portman:*

Q. Did you put her arm behind her back in the standard police operating procedure?

A. I never used that hold in my life.

Q. You grabbed her around the neck?

A. I did try to grab her around the neck.

Q. Do you recognize this coat?

A. Not off hand.

Q. Did you recognize it now after looking at it?

A. Is there any reason I should recognize it? I don't.

Q. You testified Mrs. Lewis humped on your back. Did Mr. Lewis say anything to you when you grabbed his wife?

A. Not that I can remember.

Q. Do you recall him asking not to wrestle with his wife but he was a man and to wrestle with a man?

A. Not that I remember. I don't know what he said.

Q. Do you recall Mrs. Lewis saying to leave her husband alone because he just had a heart attack two days previous?

A. No.

Q. Do you recall Mr. Lewis saying to leave Mrs. Lewis alone and allow her to remain home to keep their three children?

A. I don't remember. I don't know whether Mr. Lewis said anything or not.

Q. Your testimony is that you never threw Mr. Lewis against the truck and searched him?

A. After he was arrested.

Q. When was he under arrest?

A. When he jumped on my back he was under arrest.

[Tr. 18] *Atty. Portman:*

Q. At what point did you put Mrs. Lewis under arrest?

A. When she resisted me.

Q. You stopped Mr. Lewis and asked for a driver's license and he was under arrest?

A. No.

Q. The reason you stopped him was because he was following you?

A. Yes sir. I wanted to find out what the man wanted.

Q. Was any other officer present?

A. At which time?

Q. At the time you grabbed Mrs. Lewis and arrested Mr. Lewis.

A. One other officer came to my assistance.

Q. What is his name?

A. Officer Sunseri.

Q. He was present at the time?

A. I don't know. When he got there all I know was he took Mr. Lewis off my back. Exactly what time he got there I cannot say.

Q. Did you say to Mrs. Lewis when she asked you to leave her husband alone because of his heart condition that he ought to die and you both are going to jail?

A. No.

Q. Did Mrs. Lewis tell you she didn't see anything like this in her life and she was going to report you to Supt. Giarrusso?

A. She didn't tell me that.

Q. Didn't you tell her to shut up and used the words "black bitch and mother fucker" and at that time she said she would report you to Supt. Giarrusso?

A. No.

[Tr. 19] *Atty. Portman:*

Q. You are aware now that Mrs. Lewis did file a complaint with the Superintendant?

A. Perfectly aware. It isn't a hard procedure to do.

Atty. Portman:

No further questions.

* * * *

Patn. L. Sunseri, witness for the City, duly sworn, testified:

Atty. Borne:

Q. Please state your name and by whom employed.

A. Patn. L. Sunseri, New Orleans Police Department.

Q. On the third day of January 1970 did you receive a call over the police radio for assistance from Officer Berner?

A. I did, yes sir.

Q. Tell the court what was the nature of the call and what were the circumstances when you did arrive on the scene.

A. To start out—the call was received he was being followed by a truck. Officer Berner was riding a one man police car.

Atty. Portman:

That is hearsay testimony.

Court:

What is?

Atty. Portman:

What Officer Berner was saying.

Court:

Q. You went to Officer Berner's assistance?

A. Yes sir on the radio call.

[Tr. 20] *Court:* Q. What happened?

A. I pulled the car up there and observed the two subjects before the bar standing by the truck. Officer Berner was talking to the colored female at which time I had my door closed and could not hear. I saw him grab her. A few minutes later the colored male went around the truck and grabbed Officer Berner around the neck. I put it over the radio and called for assistance and I jumped out and grabbed the colored male and pulled him off Officer Brener's neck. I took subjects to Officer Brener's police car.

Q. Did you at any time hear Officer Berner use obscene language to the two defendants befor the bar?

A. I did not.

Q. When Officer Berner tried to subdue the female defendant before the bar did he have trouble doing so?

A. Yes sir he did. He was struggling with her.

Court:

It would be a conclusion. He was just trying to arrest the defendant and when you arrived there then there was a struggle and the male defendant jumped on Officer

Q. Did you find out why he had trouble?

A. He went around the truck and jumped on Officer Berner's back.

Atty. Portman:

Q. You said he jumped on his back—what do you mean by jumping?

A. The fact is he grabbed Officer Berner around the neck and overpowered him.

[Tr. 21] *Atty. Portman:*

Q. He brought him to the car?

A. I didn't say that.

Q. What did he do to overpower him?

A. Officer Berner looked like a piece of ham between two pieces of bread. That's about the size of these two people.

Court:

Q. You stopped him from doing what he was doing?

A. Yes sir.

Atty. Portman:

Q. You didn't hear the conversation between Officer Berner and the defendant prior to the time you saw Officer Berner grab Mrs. Lewis, is that correct?

A. Correct.

Q. Will you testify you did not hear Mrs. Lewis say she would report this incident to Supt. Giarrusso?

A. I don't recall her saying that.

Q. You don't recall anything?

A. I was sitting in my police car with the door closed waiting for the radio to clear to let them know where I was. At the time they were struggling.

Q. When you got out the car what did Mrs. Lewis say?

A. I don't know what she said.

Q. Do you recall what Mr. Lewis said?

A. No.

Q. You have no recollection of all the words that were used?

A. No I don't.

Atty. Portman:

I would like to ask for a directed judgment of acquittal on the grounds I mentioned before that there is no showing by the testimony of the officer

[Tr. 22] *Atty. Portman:*

of a lawful arrest. The testimony of Officer Berner is that the defendant's truck was stopped for no violation or crime or cause or felony committed in his presence. I refer to the Miranda and Saia cases and in this instance Mr. Lewis was asked for his driver's license, stopped by the officer and this was the point of arrest.

Court:

At the present time I feel I should dismiss the affidavit against Joseph Lewis on a technicality because it was impossible to be in the position cited in the affidavits as the two streets run parallel. It's purely on technicality. As far as Mrs. Lewis I will deny it.

Atty. Portman:

I will take an exception to Mrs. Lewis.

Court:

Officer Berner was being sought by these people because in their belief he knew something about this.

Atty. Portman:

I take an exception to the ruling.

* * * *

Joseph Lewis, Sr. (former defendant dismissed and now testifying in behalf of Mrs. Lewis, his wife, being duly sworn, testified:

Atty. Portman:

Q. State your name and home address.
A. Joseph Lewis, Sr., 5515 Lafaye Street.

[Tr. 23] *Atty. Portman:*

Q. On January 3 were you in a truck with your wife late that evening?
A. I was.
Q. Is that your own truck?
A. My own truck.
Q. Do you have a valid operator's license for driving in the State of Louisiana?
A. Yes sir.
Q. Tell the court why you were in the truck that afternoon.
A. I was going to the bakery and some officer came back with one of my little boys in the car and I ran back and stopped and asked what for. He had the little girl and the other little boy and I said to turn them loose because he didn't have no business with them. Officer Berner was there. I asked why for Joseph and they said "if you want to find out follow us to the central lockup." I sat by the fire station from 4:00 o'clock to quarter to six. I sat there and sent the other child home to get my wife. Joseph said "daddy don't leave me they said they are going to beat me." I said that I would go to the central lockup so I sat by the fire station on Franklin. Officer Berner said to move on or you will go to jail. I told him if I moved from there I would go to the other side. I went to the other side of Franklin. Then about 6:00 o'clock they pulled out. One officer had Joseph and he pulled out. Officer Berner got behind and drove 15 miles an hour and I could not

[Tr. 24] *Joseph Lewis, Sr. continued:*

pass him. He got to Elysian Fields and turned up and I turned up. They had Joseph in a car going to the

lake. I got to New York Street and list them. I went out there and he was in the Burger King. He pulled out and I stopped and he turned his light.

Atty. Portman:

Q. You saw Officer Berner turn and pull in the Burger King? What did you do?

A. I was going toward New York.

Q. He disappeared?

A. Yes sir. The light caught me and that was what made me turn off after that. So my wife said "it looks like him and she said don't run." I said I didn't have to run because there was nothing to run about. I stopped and he got out the car and said "let me see your god damned license. I'll show you that you can't follow the police all over the streets." I said I would show him my license. He was cursing me.

Q. What were the words?

A. Black son of a bitch and he said he would show me about following the police all over the god damned street. I said I wasn't following him and he pushed me by the car and he gave me my license and he patted me down. I put my wallet on top of the car.

Q. Did your wife get out when you were pushed against the car or did she stay in the truck?

A. After that she got out and said "Officer I want to find out about my son." He said "you get in the car woman. Get your black ass in the god damned car or I will show you something." She said she just wanted to find out and he yelled and screamed

[Tr. 25] *Joseph Lewis, Sr. continued:*

and said "you black son of a bitch I was telling you to get back in the car." He grabbed her and said "you black son of a bitch you are going to jail." I said officer don't hurt my wife. I am a man—don't put her in jail. I have three children—let her go home. He said we both were going to jail. I asked what for because we didn't do nothing. Then he said "you black son of a bitch, you are going to jail." He called my wife a black bitch and my wife said "you are another black bitch" and then two

more officers came and I didn't put my arm around his neck. I just held him and said not to scuffle with my wife. My wife said I had a heart attack and he said "you ought to die you black mother fucker."

Q. Was that addressed to you?

A. He said I ought to die.

Q. Did you ever touch Officer Berner?

A. Just put my hand on him like trying to explain.

Q. At what point?

A. He had her around the neck and I was scuffling trying to get his hands from around her neck.

Q. Do you recognize this coat?

A. Yes.

Q. Do you recognize this rip?

A. Yes.

Q. Do you know how it happened?

A. He grabbed her.

Q. Who is he?

A. Officer Berner tried to bend her hand behind her back and grabbed her by the coat. He dragged her to the car and she said "you don't have to drag me I didn't do no violation."

[Tr. 26] *Atty. Portman:*

Q. Do you recall your wife saying anything about filing a complaint with Supt. Giarrusso?

A. She said if I can't ask you I will ask Supt. Giarrusso.

Q. Do you recall your wife using any profanity?

A. He didn't curse except when he called her a black bitch and she said he was another one.

Q. Did you at any time Mr. Lewis on this date or did your wife refuse to follow the instructions of Officer Berner?

A. No.

Q. You tried to show your license?

A. I put my wallet on top of the car.

Q. The officer did what at this point?

A. He called me a black mother fucker and shoved me against the car and searched me down.

Q. Did your wife at any time attempt to resist the officer?

A. She did not.

Q. Your testimony was that the officer said to get back in the car?

A. In the truck.

Q. She was attempting to do so and he grabbed her?

A. She put her foot on the running board and he grabbed her.

Q. You testified you were in the hospital. How many days prior to this had you been released from the hospital?

A. I had been released two days.

Q. Why were you in the hospital?

A. Something about my heart. I stayed seven days.

[Tr. 27] *Atty. Portman:*

Q. Was your wife brought to the hospital after this altercation with Officer Berner?

A. For her back.

Q. Do you know your wife to be a religious woman?

A. Yes sir.

Q. Does she customarily use profanity?

A. She doesn't curse.

Q. Has your wife ever been arrested except for traffic violations?

A. No sir.

Atty. Borne:

Q. Did you say or did you not say that you were following Officer Berner's car—you were or you were not?

A. We were.

Q. Did you know for a fact that your son was in Officer Berner's car?

A. I didn't know it. He wasn't in his car.

Q. Which car was he in?

A. He was in that other car. I forget his name.

Q. Where did they tell you they were taking your son?

A. To central lockup.

Q. Do you know where it is?

A. Yes sir.

Q. Where is it?

A. This is it here.

Q. In back of the courthouse here?
A. Yes sir.
Q. When Officer Berner pulled your car over he did ask you for your license?
A. Yes. I said yes and I showed him.

[Tr. 28] *Atty. Borne:*

Q. What did you tell him?
A. Why was he putting me in jail—why was he arresting me.
Q. He stopped your car and threatened to arrest you?
A. He didn't say what he would do. He said he would show me about following police officers.
Q. You just stated he asked for your driver's license?
A. Yes.
Q. Did he ask why you were following him?
A. He didn't.
Q. He didn't ask you why you were following him?
A. No sir he didn't.
Q. If I tell you there was testimony to that effect—that you did or he did ask why you were following him—what about that?
A. He said he would show me what I am following him for. She said he will show me about following police officers.
Q. After what time did your wife get out the truck—how much of a period after the truck was stopped did your wife get out?
A. I will say about two minutes. We sat there two or three minutes inside the truck while he raised so much sand when she told him I wanted to find out about my son.
Q. Did you hear any conversation between your wife and Officer Berner at the time?
A. Yes sir.
Q. What did your wife say?
A. She wanted to find out about our son. He said "I'm not talking to you. Get back in the truck."

[Tr. 29] *Atty. Borne:*

Q. You didn't hear your wife use profanity?

A. He called her a black bitch while we were in the car and she said he was another one.

Q. What did she do after he said to come back in the car?

A. She started back to get back in the car and he grabbed her.

Q. Did you hear Officer Berner place your wife under arrest?

A. He said she was going to jail.

Q. When Officer Berner tried to subdue your wife did he have any trouble?

A. No she tried to get his hand off her neck from pulling her.

Q. Did the other police officer come to the aid of Officer Berner when you jumped on his back?

A. I didn't jump on his back.

Q. Where were you?

A. Trying to pull my hand away during the scuffle.

Q. How did the officer get you to grab you if you were trying to break it up?

A. He didn't brag me. There were as many of them got there ; ' you didn't know who was there.

Q. How many?

A. Five or six cars were there.

Q. Prior to this incident did you know Officer Berner?

A. Sure.

Q. Before that day?

A. I didn't see him.

Q. Is there any reason why Officer Berner should be vindictive against you and your wife?

A. I don't know. He said to follow him to the central lockup.

[Tr. 30] *Atty. Borne:*

Q. Do you feel it was Officer Berner or the police in general being aggressive against you?

Atty. Portman:

I object to that. It's irrelevant and I see no value to that. It's calling for a conclusion.

Court:

No more irrelevant than any other question. He is establishing something in your favor. He has no reason to believe Officer Berner is prejudiced against him.

Atty. Borne:

There was something previous I was trying to find out. That was the object of my question. His answer was no and therefore I have no reason to believe he was vindictive against these people.

* * * *

Mallie Lewis, defendant, duly sworn, testified:

Atty. Portman:

Q. What is your name and address?

A. Mallie Lewis, 5515 Lafaye Street.

Q. Would you state where you were on the evening of January 3, 1970?

A. I was in my kitchen finishing cooking around 4:30 and my son 19 and my son 8 were standing on Prentiss between Lafaye and Baccich and my son 8 came running home and said "Mama they arrested Jo'Jo, my son 19. My daughter 12 was home and I made her go see why they had him because I could not come right now. She went down there and they stayed so long I came out to the front door and I saw a neighbor of mine and he said "do you know what happened down the street—and I said "no." So I sent my daughter.

[Tr. 31] *Mallie Lewis, continued:*

He said they arrested a girl and put her in the car. I said no I just sent her down there and he said did she have on a red dress. I said yes and he said they put her in the car. I said that my husband just went down the street and I hope he already saw it. He said my husband was there and that he was coming back because he didn't think it was that much. I came back in to feed my baby around 5:30 and my daughter came in crying. I asked what was wrong she stayed so long. She said the police had her dragging her by the back

of her neck and by her dress and they were hitting her in the stomach.

Q. Your daughter said this?

A. Yes sir.

Q. How old was she?

A. Twelve. She made thirteen the first of last month. In a few minutes I said "where is your daddy: and he came in the front door. He said "put on something." I said "I won't put on anything except my coat." He said Jo-Jo said not to leave them because they were going to whip him. I said from 4:30 to now what are they doing around there because it's not that far to central lockup. I put on my coat and we get in the truck. They were on Franklin at the fire station. They had my son but he wasn't in Officer Berner's car. He was in the car and if he didn't have anything to do with it he was sure officiating and doing everything. I went to the car and asked my son what he did and he said nothing—he was just skating. I asked him if he was sure and he said there were other boys but they didn't catch them. I asked why he said

[Tr. 32] *Mallie Lewis, continued:*

I asked why he said they would beat him and he said he didn't know why but they would beat him. I went to the truck and what he told my husband I don't know.

Atty. Portman:

Q. Officer Berner?

A. Yes sir. I didn't see anyone else. The officer who had my son was in the car. The car my son was in was behind Officer Berner's car. The officer had my son in a car in the fire station. He had such a nasty attitude I didn't tell him anything. My husband said they didn't want me to stay over there. I said go on the other side of Franklin. Why were they holding him for two hours? They didn't have no business to arrest him and hold him that long. When they pulled off Officer Berner let the car my son was in get around him and then go ahead. He got in the middle of the street between us and the car my son was in and drove fifteen

miles per hour and kept us from passing him. We lost the car and went fifteen blocks and I told him I knew he was going to try to do that. He wouldn't have gotten in front of us that way if he wasn't trying to throw us off the trail. I said come on and we will go around to central lockup. The light caught us at Franklin and Robert E. Lee and he was ahead of us a good ¾ of a car length and the red light caught us and that made him disappear. I didn't care because he didn't have my son in that car. We were not looking for him but he was officiating. We turned off on New York to turn back and I said we will go to central lockup. Then we saw him.

[Tr. 33] *Atty. Portman:*

Q. You were on your way to central lockup?

A. Yes sir. I don't know where they disappeared to. I wasn't worried about it being lost because it wasn't the car my son was in. It doesn't take no two hours when someone is arrested and going to central lockup doesn't take that long. We passed Burger King and I saw the car. He pulled up and backed up in Burger King. I said to go on as if you don't see him and he won't have any chance to do anything and we will report it. He stopped us after we got to Pasteur and Cameron Boulevard. New York was right into Pasteur and Pasteur runs into Curier. At that intersection be blows his siren. We didn't stop so he blew it. I told my husband to stop because it looked like he was after us. He put that siren on and came about 50 miles an hour from that little distance. My husband got out. I went there after he grabbed him and snatched him around and I got in trouble. He said "give me your so and so license." The attitude he had I told him he didn't act like an officer. Anything I asked him—well I am a Christian woman and I don't use profane words like he was saying. I didn't tell him one word. I said "Officer I want to know where they are taking my son." I know they take boys back there and beat them. Sometime they don't come out of it. He cursed me and said to get back in the god damned car and he was screaming someone was drunk or something. He said to get in the car. I said if I wasn't

going to get information from him and the other officer I was going to Giarrusso. He said if you don't get in the car god damn it I will take you to jail. He didn't answer my question.

[Tr. 34] *Mallie Lewis, continued:*

He was just srceaming and yelling like I did him something. I said I will get in the truck but I am going to Giarrusso tonight. He said "you are going to jail tonight." I went to put my feet on the running board and he grabbed me by my neck. We went to the car with his hand on my neck. He said "I am not here for no playing or foolishness."

Atty. Portman:

Q. Is this your coat? Can you identify it?
A. Yes.
Q. Is it ripped here?
A. Yes sir. After the struggle he grabbed me just like this and shoved me the car and tore my coat.
Q. You went to the hospital?
A. Yes.
Q. Is this a hospital report on you?
A. Yes it is.

Atty. Borne:

I object to the offer of this into evidence. The writing is not the same in the entire report.

Court:

I don't see where it has anything to do with this.

Atty. Borne:

Some of the facts in this case are placed into this report.

Atty. Portman:

One is a laboratory finding and one the nurses' remarks.

Court:

It's not relevant to what happened here. We are not trying to find something that happened a day or so after.

[Tr. 35] *Atty. Portman:*

I am submitting it for the purpose of showing a scuffle and the injuries caused to her.

Court:

It's not part of this.

Atty. Portman:

It's the res geste of the incident.

Court:

It's admitted there was a struggle.

Atty. Portman:

I take an exception.

Court:

To what? You offered it in evidence.

Atty. Borne:

I object. It's irrelevant. There is no authority for its authenticity and the handwriting is different on the report.

Court:

It's irrelevant. It has nothing to do with the charge we are considering. It might be relevant to something else—not this.

Atty. Portman:

I take an exception.

Q. At this point the officer grabbed you?

A. Behind my neck. He pulled my arm behind me like this and then braced himself against me. He was going to drag me to the car and I said I would not let him drag me to the car.

Q. You shoved him away?

A. Yes. My husband come and he said "don't wrestle with her, do it with me— I m a man."

[Tr. 36] *Mallie Lewis, conti d:*

He was cursing all the time in a very nasty attitude.

Atty. Portman:

Q. Did he call you a black bitch?

A. About eight or nine cars of police same then. He called them when he was in the parking lot. Then while we were scuffling eight or nine cars of police came and as I looked around one had a billy stick going to hit me and when I turned around he eased it down. After they came he started cursing. Everyone came out the house. This was on Cameron.

Q. It's a white neighborhood?

A. Yes sir. Before they got in close enough to see anything they all looked in the car and I asked how I looked to them putting a flashlight in my face. I said "how do I look to you." By husband said "I don't see what you have us in this car for. We didn't do anything. We told you we wanted to see my son because we didn't want you to beat him." Then he told him that we have two little chilfdren at home—a boy and a daughter. My husband said to let me go back and he said he was out the hospital two days with his heart. Then he said "you black mother fucker, you should die." That's the words he was using all the time. He said "you ought to be dead, shut up you black bitch, you black mother fucker." I said "you are another one." I don't use the words but he was there for all that. I wasn't out there for any boisterousness because you know you are supposed to give them a certain amount of honor.

[Tr. 37] *Atty. Portman:*

Q. Did you at any time other than the one incident when the officer called you a black mother fucker use any profanity toward the officer?

A. No. I didn't say a word after I told him what I was out there for. After that I didn't say one word and he reached his hand this way and put his arm around my neck. I didn't say another word.

Q. Up to the time the officer grabbed you by the neck were you following his truck and he told you to go back to the car?

A. He told me he was on this with my husband after I went around and snatched him around and said he was sick. I said he wanted to know where they were

taking my son. He said to get back in the god damned truck, woman. He was screaming. I said certainly I would get back in the truck but what was this. I never seen nothing like this before in my life—just coming to ask the officer for information. I said I would go to Giarrusso. He said to get back in the god damn truck now or else you will go to jail. I told him I would go to Giarrusso tonight and he said I was going to jail. He didn't get the driver's license—he grabbed me by the neck so I put my feet on the running board.

Q. You were trying to get in the car as the officer told you and he pulled you out?

A. Yes sir.

Atty. Borne:

Q. Were you driving?

A. No.

[Tr. 38] *Atty. Borne:*

Q. Your husband was?

A. Yes. My son was sitting in the car behind Officer Berner's car.

Q. I am not talking about that.

A. I am telling you. That is why we were following.

Q. You were following Officer Berner?

A. Him and whoever had my son. This officer had my son and he got in before him. We were behind the car with my son. He parked on the side to let the car with my son ahead of him and he got by us. We weren't following Officer Berner.

Q. Your husband testified he was following Officer Berner.

A. The reason we were following was we were following the car with my son.

Q. When Officer Berner stopped your husband he got out the truck?

A. Yes.

Q. Why did you get out?

A. After he pushed him against the car.

Q. The officer said to get out?

A. No. He got out.

Q. The officer cursed you merely because you asked where your son was?

A. He most certainly did. He knows that.

Q. That is the only reason he did what you alleged he did?

A. Yer he did it what he did. He knows that. He is well aware of it. I told him about it.

Q. It's hard for me to understand that.

A. He knows it.

[Tr. 39] *Atty. Borne:*

Q. Why did you get out the car?

A. I had a reason. My husband just got out the hospital two days ago. I asked the officer where he took my son.

Q. Did you use any profanity?

A. Not until we were placed in the car and he called me a black bitch.

Q. There's no reason why Officer Berner would lie and say you used profane language is there?

A. I don't know. He did a lot that night. He knows why. I don't know why.

Q. Did you resist him at all?

A. I didn't resist.

Court:

He said you did. He said you wouldn't let him put you in the car.

A. I didn't give any resistance. I wouldn't let him drag me to the truck.

Atty. Borne:

Q. You didn't resist him?

A. No. Why I did that he didn't have no business grabbing me.

Q. If you did it?

A. I did it yes to defend myself.

Q. Before this date did you know Officer Berner?

A. I didn't know nothing about him.

Court:

Q. You knew where they were taking your son. How many blocks did you follow Officer Berner's car?

A. Maybe eight or nine blocks.

[Tr. 40] *Court:*

Q. You could not have turned off?

A. We weren't following him.

Q. You knew where the other car was going—you weren't interested in Officer Berner?

A. We could not turn.

Q. In eight blocks you could not turn?

A. We didn't see it. After we got to Elysian Fields I told my husband to turn off. He wasn't interested in the car in front of us with my son in it. We weren't following him. The car we were interested in was the car with my son. He was officiating the whole thing with the other policeman who had my son in the car.

Atty. Portman:

Q. Three cars were leaving the scene of the arrest?

A. Right.

Q. The first car was your son?

A. No Officer Berner was the first car and my son was second and we were third.

Q. What happened to the car your son was it?

A. I don't know where it went. Officer Berner got on the side and stood there until the car carrying my son passed and then he pulled over.

Q. At that point what was the car your son was in doing?

A. Officer Berner was first then my son and us.

Q. After that Officer Berner got between the two?

A. Yes.

Q. Could you see when Officer Berner got in front of you where the first car with your son was?

A. I could not see it. I know he was only driving about 15 miles an hour ahead of us.

[Tr. 41] *Atty. Portman:*

Q. Why didn't you go directly to central lockup? Why did you follow your son?

A. He said they were going to beat him. It was two hours from the time of arrest and the time it happened. Why didn't they take him to the lockup first.

Q. When Officer Berner pulled off to the side of the road by the Burger King did you stop there and wait until he pulled out?

A. I was going to central lockup and if my son wasn't there I was going to report it. I told my husband to go on. He already made us lose the car he was in. Before they did anything to him I was going to central lockup and report it if he wasn't there.

Q. When Officer Berner grabbed you around the neck what did you do—try to get his hand off?

A. Yes I did.

Q. Did you do anything else beside defend yourself?

A. No.

Q. Did you strike him in the face?

A. I didn't do anything. I just pulled his hand off my neck.

Atty. Portman:

I have no further questions.

Atty. Borne:

That's the City's case.

* * * *

DECISION OF THE COURT:

As far as Mr. Lewis is concerned, I will dismiss that charge on a technicality because the streets run parallel and there is a mistake in the affidavit, but as far as

[Tr. 42] DECISION OF THE COURT:

the defendant, Mrs. Mallie Lewis, I find her guilty of violating Ordinance 828 MCS, Section 49-2, resisting arrest and Section 49-7 reviling the police and sentence her to pay a fine of $10.00 or serve 10 days in jail on each charge. As far as the defendant, Joseph Lewis, Sr., is concerned, he is dismissed.

Atty. Portman:

I give notice of an appeal.

Court:

Appeal is granted and certified copy of Ordinance 828 MCS, Section 49-2 and 49-7 is hereby made part of the record.

* * * [Certificate Omitted in Printing] * * *

JUDGMENT OF THE CRIMINAL DISTRICT COURT AFFIRMING CONVICTIONS, DECEMBER 15, 1970

No. 217-361, Section "E"

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

STATE OF LOUISIANA

versus

MALLIE LEWIS

In the Matter of: City of New Orleans versus Mallie Lewis—Affidavit No. 110895

JUDGMENT

This matter is on appeal to this Court from the Municipal Court of the City of New Orleans wherein the defendant is charged with resisting arrest and reviling the police. .

Counsel for defendant, after the trial, filed a Motion in Arrest of Judgment, on the grounds that M.C.S. Section 49-7 was unconstitutional because "it is unconstitutionally vague and overbroad". Section 49-7 defines in detail what shall constitute reviling the police and, therefore, is not vague or overbroad and the defendant by said ordinance is prohibited from cursing or using obscene language to any member of the New Orleans Police Department.

The Motion in Arrest of Judgment was properly overruled by the lower court.

The conviction and sentence of the lower court are affirmed.

New Orleans, Louisiana, this 15th day of December, 1970.

/s/ Rudolph F. Becker, Jr.
RUDOLPH F. BECKER, JR.
Judge, Section "E"

ORDER OF THE LOUISIANA SUPREME COURT
REFUSING WRITS, MARCH 10, 1971

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

March 10, 1971

No. 51,231

CITY OF NEW ORLEANS

v.

MALLIE LEWIS

In re: Mallie Lewis applying for writs of certiorari, review, mandamus and prohibition.

Writ refused. The judgment of the lower court is correct.

/s/ JWS

/s/ EHMcC

/s/ WBH

/s/ FWS

DIXON, J., dissents from refusal, being of the opinion that the ordinance is clearly unconstitutionally vague, overbroad and is an unlawful restriction upon freedom of speech.

Order of the United States Supreme Court Vacating Judgment and Remanding the Case, June 26, 1972

SUPREME COURT OF THE UNITED STATES

Mallie Lewis

v.

City of New Orleans

On Appeal From the Supreme Court of Louisiana

No. 70-5323

Decided June 26, 1972

The motion for leave to proceed *in forma pauperis* is granted.

The judgment is vacated and the case is remanded to the Supreme Court of Louisiana for reconsideration in light of *Gooding* v. *Wilson*, 405 U.S. —— (1972).

Mr. Justice Powell, concurring in the result.

Under *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), the issue in a case of this kind is whether "fighting words" were used. Here a police officer, while on the performance of his duty, was called "G__ D__ M__ F__" police.

If these words had been addressed by one citizen to another, face to face and in a hostile manner, I would have no doubt that they would be "fighting words." But the situation may be different where such words are addressed to a police officer trained to exercise a higher degree of restraint than the average citizen. See Model Penal Code § 250.1, Comments, at p. 14 (Tent. Draft No. 13, 1961).

I see no genuine overbreadth problem in this case for the reasons stated in my dissenting opinion in *Rosenfeld* v. *New Jersey*, *post*, p. ——.

I would remand for reconsideration only in light of *Chaplinsky*.

Dissent by MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join.

Dissent by MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join.

(See both dissents printed with *Rosenfeld* v. *New Jersey*, decided this date.)

JUDGMENT AND OPINIONS OF THE LOUISIANA SUPREME COURT AFFIRMING CONVICTIONS, NOVEMBER 6, 1972

SUPREME COURT OF LOUISIANA

No. 51,231

CITY OF NEW ORLEANS

vs.

MALLIE LEWIS

ON REMAND FROM THE UNITED STATES SUPREME COURT

HAMLIN, Justice:

The United States Supreme Court, June 26, 1972, vacated the judgment of our Court of March 10, 1971 in City of New Orleans vs. Mallie Lewis, which recited: "Writ refused. The judgment of the lower court is correct." It remanded the cause to us for reconsideration in the light of Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L. Ed. 2d 408 (1972). 408 U.S. 913, 92 S.Ct. 2499, 33 L. Ed. 2d. 321 (Mr. Chief Justice Burger, with whom Mr. Justice Blackmun and Mr. Justice Rehnquist joined, dissented.)

Mallie Lewis was issued a citation for reviling the police on January 3, 1970; she was tried in the First Municipal Court, City of New Orleans, and found guilty of violating Ordinance 828 MCS, Section 49-2, resisting arrest, and Section 49-7, reviling the police. She was thereafter sentenced to pay a fine of $10.00 or serve ten days in jail on each charge.[1]

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[1] We do not have the record of the First Municipal Court before us, but Justice Lewis F. Powell, Jr., concurring in the remand of the United States Supreme Court stated, "* * * Here a police officer, while in the performance of his duty, was called, 'G__D__M__F' police."

An appeal was lodged in the Criminal District Court for the Parish of Orleans; that court affirmed the conviction and sentence.[2] Mallie Lewis then applied to this Court for writs, which, as stated supra, were refused. 257 La. 993, 244 So.2d 860. An appeal was taken to the United States Supreme Court where defendant was granted the instant remand.

Herein, Mallie Lewis avers that the First Municipal Court, City of New Orleans, and the Criminal District Court for the Parish of Orleans erred in holding the reviling the police ordinance, 828 M.C.S. 49-7, constitutional.

Counsel for Mallie Lewis submits:

"The Ordinance involved here suffers from all the defects of the Georgia statute and more. There are not even in the New Orleans ordinance the requirements that the words be spoken 'without provocation,' that the words 'tend to cause a breach of the peace,' or that the words be spoken 'in the presence' of the one spoken about. Like the Georgia statute the New Orleans ordinance sweeps within its proscription all forms of abusive and derogratory speech. Even more so than was the case with the Georgia statute, it is impossible to justify the ordinance under the narrow exception to free speech provided in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942).

"The New Orleans ordinance, 828 M.C.S. 49-7, must be found unconstitutional under *Gooding* v. *Wilson*, *supra*. Defendant Lewis' convictions for reviling the police and

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[2] The judgment of the Criminal District Court for the Parish of Orleans recites in part:

"A review of the evidence in this case fully convinces this court that the defendant violated both Section 49-2 and 49-7 of Ordinance 828 M.C.S.

"Counsel for defendant, after the trial, filed a Motion in Arrest of Judgment, on the grounds that M.C.S. Section 49-7 was unconstitutional because 'it is unconstitutionally vague and overbroad.' Section 49-7 defines in detail what shall constitute reviling the police and, therefore, is not vague or overbroad and the defendant by said ordinance is prohibited from cursing or using obscene language to any member of the New Orleans Police Department.

"The Motion in Arrest of Judgment was properly overruled by the lower court.

"The conviction and sentence of the lower court are affirmed."

for resisting arrest must be reversed with instructions to discharge the defendant Lewis."

Counsel's constitutional attack of Section 49-7, 828 M.C.S., is based on alleged overbroadness and vagueness; the Section as certified by the Assistant Clerk of Council recites:

> "Section 49-7. *Cursing, etc., police prohibited.* "It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty. (Flynn's Digest 1896, art. 1363.)"

The City of New Orleans contends that due to prior decisions of the United States Supreme Court and to the particularized scope of Section 49-7, where "wanton" cursing and reviling of a police officer must occur while he is in the performance of his duty, the Section is not vague and overbroad as contended by defendant. It prays that the judgments of the lower courts upholding the constitutionality of Section 49-7 be affirmed.

I.

Initially, we shall discuss the case of Gooding v. Wilson. The defendant was convicted in the Georgia courts on two counts of using opprobrious words and abusive language in violation of Georgia Code Section 26-6303 which recited:

> "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor."

Habeas Corpus proceedings in the District Court for the Northern District of Georgia were taken, and the District Court held Georgia Code Section 26-6303 unconstitutionally vague and broad, 303 F.Supp. 952; it set aside the defendant's conviction. The Court of Appeals for the Fifth Circuit affirmed, 431 F.2d 855 (1970);

the United States Supreme Court noted probable jurisdiction of the State's appeal; it affirmed.

In Gooding, the Supreme Court stated: "* * * In other words, the statute must be carefully drawn or be authoritatively construed to punish only *unprotected speech* and not be susceptible of application to protected expression. * * *" 92 S.Ct. at p. 1106. (Emphasis ours) The Court further stated: "* * * Our decisions since *Chaplinsky* have continued to recognize state power constitutionally to punish 'fighting' words under carefully drawn statutes not also susceptible of application to protected expression, Cohen v. California, *supra*, 403 U.S., at 20, 91 S.Ct., at 1785; Bachellar v. Maryland, 397 U.S. 564, 567, 90 S.Ct. 1312, 1314, 25 L. Ed. 2d 570 (1970); see Street v. New York, 394 U.S. 576, 592, 89 S.Ct. 1354, 1365, 22 L. Ed. 2d 572 (1969). We reaffirm that proposition today." 92 S.Ct. at pp. 1106-7.

In affirming the District Court and the Court of Appeals, the United States Supreme Court concluded in Gooding v. Wilson as follows:

> "We conclude that '[t]he separation of legitimate from illegitimate speech calls for more sensitive tools than [Georgia] has supplied.' Speiser v. Randall, *supra*, 357 U.S., at 525, 78 S.Ct., at 1342. The most recent decision of the Georgia Supreme Court, Wilson v. State, *supra*, in rejecting appellee's attack on the constitutionality of § 26-6303, stated that the statute 'conveys a definite meaning as to the conduct forbidden, measured by common understanding and practice.' 223 Ga., at 533, 156 S.E.2d, at 448. Because earlier appellate decisions was no likelihood that the person addressed would make an immediate violent response, it is clear that the standard allowing juries to determine guilt 'measured by common understanding and practice' does not limit the application of § 26-6303 to 'fighting' words defined by *Chaplinsky*. Rather, that broad standard effectively 'licenses the jury to create its own standard in each case.' Herndon v. Lowry, 301 U.S. 242, 263, 57 S.Ct. 732, 741, 81 L. Ed. 1066 (1937). Accordingly, we agree with the conclusion of the District

> Court, [t]he fault of the statute is that it leaves wide open the standard of responsibility, so that it is easily susceptible to improper application.' 308 F. Supp., at 955-956. Unlike the construction of the New Hampshire statute by the New Hampshire Supreme Court, the Georgia appellate courts have not construed § 26-6303 'so as to avoid all constitutional difficulties.' United States v. Thirty-Seven (37) Photographs, *supra*, 402 U.S., at 369, 91 S.Ct., at 1405.

"Affirmed."

We do not find Georgia Code Section 26-6303 as written and Section 49-7, 828 M.C.S. New Orleans, Louisiana, similar. The Georgia section provided that the prohibited language would have to tend to cause a breach of the peace. Sec. 49-7 provides that it *shall* be a breach of the peace to use the prohibited language toward or with reference to any member of the city police *while in the actual performance of his duty*. Our section is restricted to any member of the city police; it is narrow; it is specific.[3] The Georgia Section was not specific or narrow; it pertained "to or of another."

II.

There is a major difference between a member of the city police while in the actual performance of his duty and "another." Black's Law Dictionary, Revised Fourth Edition, 1968, defines a Police Officer as: "One of the staff of men employed in cities and towns to enforce the municipal police, i.e., the laws and ordinances for preserving the peace and good order of the community. Otherwise called 'policemen.'" See, 62 C.J.S. Municipal Corporations, Sec. 568, p. 1090 et seq.; 47 Am. Jur. Sheriffs,

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[3] In National Ass'n for Advance. of Colored People v. Button, the U. S. Supreme Court at 83 S. Ct. p. 338 said: "* * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. Cantwell v. Connecticut, 310 U.S. 296, 311, 60 S. Ct. 900, 906, 84 L. Ed. 1213."

Police, and Constables, Sec. 5, Peace Officers as Public Officers, p. 823 et seq.

In Green v. City of Bennettsville, 15 S.E.2d 334, 336 (1941), the Supreme Court of South Carolina stated:

" 'Policeman' has been defined as: 'A member of the Police.' 'Police' is defined: 'An organized civil force for maintaining order, preventing and detecting crime, and enforcing the laws; the body of men by which the municipal laws and regulations of a city, town, or district are enforced.' Webster's Twentieth Century Dictionary, Unabridged. And again it is defined:

" 'That species of superintendence by magistrates which has principally for its object the maintenance of public tranquility among the citizens. The officers who are appointed for this purpose are also called the police. * * *

" 'The word *police* has three significations. The *first* relates to the measures which are adopted to keep order, the laws and ordinances on cleanliness, health, the markets, etc. The *second* has for its object to procure to the authorities the means of detecting even the smallest attempts to commit crime, in order that the guilty may be arrested before their plans are carried into execution and delivered over to the justice of the country. The *third* comprehends the laws, ordinances, and other measures which require the citizens to exercise their rights in a particular form." See, Wyndham v. United States, 197 F.Supp. 856 (1961).

"Policemen of a city or town are peace officers and a policeman is a public officer, whose duties relate to governmental functions of a municipality." Klam v. Boehm, 240 P.2d 484 (1952). "* * * the term 'Policemen,' as that term is generally used and understood, means a person who is a member of an organized civil force for maintaining peace and order, preventing and detecting crime, and enforcing the law. A policeman of a city is a person who has been authorized and empowered by the city to perform duties which relate to its governmental function of maintaining peace and order." Tezeno v. Maryland Casualty Company, 166 So.2d 351, 356 (1964).

The above jurisprudence affirms that a police officer is a peace officer and that he keeps the peace; it stands

to reason that wantonly cursing or reviling, or using obscene or opprobrious language toward or with reference to any police officer while in the actual performance of his duty is a breach of the peace. "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others." Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 1220.

Freedom of Speech is protected by the First and Fourteenth Amendments to the United States Constitution; however, the United States Supreme Court in National Ass'n for Advance. of Colored People v. Button, 83 S.Ct. at 341, stated: "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." The Court also stated in Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303, 95 L. Ed. 295, 300 (1950):

"The Court respects, as it must, the interest of the community in maintaining peace and order on its streets." Thus, as ably urged by counsel for the City of New Orleans, the City of New Orleans as an arm of the State has a compelling interest in preserving the efficient and effective operation of its police department which in turn provides for law and order on the streets. Wanton interference with a policeman while he is endeavoring to discharge his duties creates a threat to the community at large. Here, a vital State interest is in question, i.e., the efficient operation of an officer of the law while in the discharge of his duties. We find that protected speech does not apply to Section 49-7 supra. The vital and compelling interest of the City of New Orleans justifies the prohibition of certain language to a member of the city police while in the actual performance of his duties.

III.

In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L. Ed. 2d 642

(1972), the United States Supreme Court said: "It is well-settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." The Court further stated in Grayned v. City of Rockford, —— U.S. ——, 92 S.Ct. 2294 (1972), —— L.Ed.2d ——, that: "The nature of a place, 'the pattern of its normal activities, dictates the kinds of regulations of time, place and manner that are reasonable.' * * * The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest. 'Access to [the streets, sidewalks, parks, and other similar public places] for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly. . . .' Free expression 'must not, in the guise of regulation, be abridged or denied.'"

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or *'fighting'* words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instruction.' Cantwell v. Connecticut, 310 U.S. 296, 309, 310,

84 L.Ed. 1213, 1221, 60 S.Ct. 900, 128 ALR 1352." Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031, 1035 (1942).[4] (Emphasis ours)

IV.

Our consideration of the instant matter is made, as we have been directed by the United States Supreme Court, in the light of Gooding v. Wilson, 405 U.S. ——, 92 S.Ct. 1103, 31 L.Ed.2d 408. In Gooding, as quoted supra, the Court recognized the doctrine of Chaplinsky as still alive and said that the Supreme Court's decisions have recognized State power as being able to punish constitutionally "fighting words."[5]

Section 49-7 supra recites that: "It shall be unlawful and a breach of the peace for any person *wantonly* to

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[4] The statute involved in Chaplinsky, a New Hampshire statute, recited: "No person shall address any offensive, derisive, or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation." In upholding the statute, the United States Supreme Court stated:

"We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace.* * *

"Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."

[5] See also, Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 1785, 29 L. Ed. 2d 284, wherein the Court stated: "This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizens, are, as a matter of common knowledge, inherently likely to provoke violent reaction. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). * * *"

curse or revile or to use obscene or opprobrious language * * *." (Emphasis ours) We find and believe that it is self evidence that what is prohibited are "fighting words" which cannot enjoy the protection of the First and Fourteenth Amendments to the United States Constitution. We find that under the above authorities of the United States Supreme Court it was within the power of the City of New Orleans, an arm of the State, to regulate the conduct of any person towards a member of the city police while in the actual performance of his duty by prohibiting the use of "fighting words" to such policeman. Permitting the cursing or reviling of or using obscene or opprobrious words to a police officer while in the actual performance of his duty would be unreasonable and basically incompatible with the officer's activities and the place where such activities are performed. Wantonly cursing, reviling, or using obscene or opprobrious words are not protected means of communication. Prohibiting such is not a restraint of the area of public discussion; such prohibition will not render the citizenry incapable.* As found supra herein, we find that Section 49-7 is not offensive to protected speech; it is narrowed to "fighting words" uttered to specific persons at a specific time; it is not overbroad and is therefore not unconstitutional.

George Code Section 26-6303 supra recited that "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, * * *." Section 49-7 prohibits "any person *wantonly* to curse or revile or to use obscene or opprobrious language * * *." (Emphasis ours)

We find that the prohibitions of Section 49-7 are self explanatory; they are not vague. Any reasonable man

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* In Cohen v. California, supra, the Court said of Free Speech: "* * * It is designed and intended to remove government restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. * * *" 91 S. Ct. at p. 1788.

knows what it is to wantonly curse or revile; our Section is not confined to "opprobrious words or abusive language," as was the Georgia statute.[1] *The Section definitely does not sweep within its proscriptions all forms of abusive and derogatory speech.* The proscriptions are narrow and specific—wantonly cursing, reviling, and using obscene or opprobrious language.

We conclude that Section 49-7 is not vague; it is constitutional and meets the test of Coates v. City of Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), an ascertainable standard.

Having thoroughly considered this cause in the light of Gooding v. Wilson, 405 U.S. ——, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972), we now hold that Section 49-7, 828 M.C.S., New Orleans, Louisiana, is constitutional.

It is ordered and decreed for the reasons above assigned that Mallie Lewis' convictions and sentences be affirmed; the judgments of the First Municipal Court, City of New Orleans, and the Criminal District Court for the Parish of Orleans are affirmed.

BARHAM, J., dissents with written reasons.

TATE, J., dissents with written reasons.

DIXON, J., dissents and subscribes to the reasons enunciated in Justice Tate's dissent.

BARHAM, Justice (dissenting).

This case was remanded to us for consideration in light of Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). For the reasons assigned by the United States Supreme Court in that case we are required to declare the municipal ordinance, 828 M.C.S. 49-7, unconstitutional. I concur in Mr. Justice Tate's dissent.

TATE, Justice (dissenting).

The defendant was here convicted of violating a municipal ordinance which forbids reviling the police. She cursed the police after they had arrested her son.

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[1] The word "wantonly" does not appear; only the words "without provocation." Our ordinance provides for cursing or reviling or using obscene or opprobrious language. The Georgia statute is confined to opprobrious words or abusive language.

A majority of this court initially denied supervisory review, rejecting the contention that the ordinance was unconstitutional on its face. 257 La. 993, 244 So.2d 860 (1971). The dissent expressed the view that the ordinance "is clearly unconstitutionally vague, overbroad and is an unlawful restriction upon freedom of speech". 244 So.2d 860.

The United States Supreme Court then granted certiorari and reversed this court. Lewis v. City of New Orleans, 408 U.S. 913, 92 S.Ct. 2499 (1972). The sole issue raised was that the ordinance is unconstitutional on its face. The high court remanded the case to us "for reconsideration in the light of Gooding v. Wilson, 405 U.S. 518 (1972)". Despite this and the circumstance that the ordinance here in question is constitutionally deficient under the standard expressed by *Gooding* v. *Wilson*, the majority again affirms the conviction.

At issue here is the contention that an ordinance of the City of New Orleans violates the First Amendment (freedom of speech) protections of the United States Constitution. See also Louisiana Constitution of 1921, Article 1, Section 3.

The ordinance in question makes it "unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the City Police while in the actual performance of his duty". Section 49-7, City of New Orleans (Adopted by Ordinance No. 828).

We should at this point note the following: Under the broad scope of the terms of the ordinance: The punishable speech includes (1) wantonly (recklessly) used "opprobrious" [1] language "with reference to" an officer engaged in the performance of his duty, (2) which lan-

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[1] As the United States Supreme Court noted in Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103 at 1107, under its definition "opprobrious" includes greater reach than "fighting words." (This was one reason the Georgia statute was declared unconstitutional.) The Court noted that Webster's New International Dictionary (1961) defines "opprobrious" as "conveying or intended to convey disgrace".

guage need not be used in the presence of the officer[2], (3) nor be of a nature tending to cause an immediate public disturbance nor used in such circumstances as likely to cause such a disturbance. Further, the punishable language need not interfere with the officer in the performance of his duty; it is sufficient only that the words be opprobrious with reference to the officer.[3]

Thus, for instance, a person sitting on a balcony overlooking the efforts of a policeman to direct traffic in the crowded French Quarter could, under the terms of the ordinance, be prosecuted for muttering, "Look at that stupid cop messing things up down there". The epithet may be used wantonly, in that it recklessly and willfully reviles the heroic efforts of the police officer. The language is punishable under the terms of the ordinance, even though the muttered opprobrious comment was overheard only by a bystander-witness up on the balcony with the "reviler", and though the policeman and no one else heard the mutter, and though the muttered criticism did not at all interfere with the unaware policeman's conduct of his duties.

We should at this point note as unquestioned the basic American philosophy that freedom of speech protects us against criminal prosecution for criticizing or even using abusive or opprobrious language with regard to our public officials and our government. As noted in Gooding v. Wilson, 405 U.S. ——, 92 S.Ct. 1103 (1972), to which we were referred by the United States Supreme Court when it reversed our prior affirmance of this same

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[2] See Chaplinsky v. New Hampshire, 315 U.S. 568, 573, 62 S.Ct. 766, 770 (1942), saving from invalidity a statute since it did "no more than prohibit the *face-to-face* words plainly likely to cause a breach of the peace." (Italics mine.)

[3] As the majority notes (see its footnote 2), the Criminal District Court for the Parish of Orleans, with primary responsibility to review convictions under this ordinance, held that the statute is not vague or overbroad since it "defines in detail what shall constitute reviling the police", for by said ordinance the defendant was "prohibited from cursing or using obscene language to any member of the New Orleans Police Department." Under this meaning, the statute clearly offends the United States Constitution, see *Gooding* v. *Wilson*, cited above.

conviction, even harsh insulting words cannot be punished except such as by their very utterance "tend to incite an immediate breach of the peace". 92 S.Ct. 1107.

In Gooding v. Wilson, 405 U.S. ——, 92 S.Ct. 1103 (1972), the United States Supreme Court held to be unconstitutional a Georgia statute punishing "any person who shall without provocation, use to or of another, *and in his presence* . . .[4] opprobrious words or abusive language, tending to cause a breach of the peace . . .", 92 S.Ct. 1104 (Italics mine.). Since the Georgia statute (like the present ordinance) punished only spoken words, the Supreme Court noted that "It can therefore withstand appellee's attack upon its facial constitutionality only if, as authoritatively construed by the Georgia courts, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments." 92 S.Ct. 1105.

The court pointed out that "the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' " 92 S.Ct. 1105. The court explained: "This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." 92 S.Ct. 1105.

The Georgia statute was invalid because it was not "narrowly drawn to apply only to a constitutionally unprotected class of words—'fighting' words—'those which by their very utterance inflict injury or tend to incite an immediate breach of the peace' ". 92 S.Ct. 1106. The court specifically pointed out that an enactment which

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[4] Note that the Georgia statute here invalidated contains, unlike the municipal ordinance in question, the limitation that the offending language be used in the presence of the reviled person. All the more reason that the present municipal ordinance is unconstitutional. See Chaplinsky v. State of New Hampshire, 315 U.S. 568, 62 S.Ct. 766 (1942).

permits criminal punishment of the use of "opporbrious" language overbroadly includes within its prohibition merely derogatory comments, not necessarily "fighting words". 92 S.Ct. 1107.

No authoritative Louisiana interpretation narrows the scope of this ordinance to include language tending to incite an immediate breach of the peace, "fighting words". In fact, quite the contrary is so. See footnote 2 and the majority opinion. The majority here holds that it may be made a criminal breach of the peace "wantonly" to use epithets or personal abuse with regard to a police officer while in the performance of his duty—indeed, this may be so, by a statute limited in application to those situations where the language creates the danger of an immediate public disturbance—, but it overlooks that the present statute, under its terms, punishes not only words used in such context, but also non face-to-face or peaceful or even private expressions of opprobrious comments. The mother is punishable under the ordinance for using the disrespectful language in her own living room as well as in the street.

The circumstance that, under the ordinance, such epithets must be used "wantonly"—that is, recklessly, willfully, see State v. Vinzant, 200 La. 301, 7 So.2d 917 (1942), 44A Words and Phrases, "Wanton"—does not so narrow the language criminally punishable as to save this enactment from overbroadness. That the opprobrious language must be used "wantonly"—recklessly, willfully —does not deprive it of constitutional protection, where not uttered under circumstances likely to cause an immediate public disturbance. As a matter of fact, as interpreted by our state courts, the simple "cursing or using obscene language to any member of the New Orleans Police Department" has been regarded as wanton reviling which is punishable under the ordinance. See Footnote 2.

The ruling in *Gooding* v. *Wilson* is decisive of this case, as the United States Supreme Court indicated by ordering us to consider the present conviction in the light of that decision.

The language there used by the defendant to a Georgia police officer was "White s_ of a b__, I'll kill you" and "You s_ of a b__, I'll choke you to death". See 92 S.Ct. 1112. In the present case, the mother called the police officer a "G_ d__ m___ f___" police. The fact that the latter words used are shocking to the sensibilities of people of our generation does not by itself justify classifying such critical language as not protected by the constitution. See Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780 (1971).

Whatever our personal views are as to what sort of language should or should not be punishable, this court is bound by our state and federal constitutions to enforce constitutional protection of individuals and their speech as interpreted by authoritative decisions of the nation's high court. That court has reversed us in the present case for not applying such principles announced by it. It has directed us to reconsider the *present* conviction in the light of *Gooding* v. *Wilson*. *Gooding* plainly indicates that the present ordinance is unconstitutionally overbroad on its face, just as was the quite similar Georgia statute in that case, in that it subjects to punishment constitutionally protected language as well as language not so protected.

The police, our front line soldiers in the battle against crime, deserve the respect and support of our officials and citizens. Nevertheless, ever since this nation fought for and obtained its freedom, it has not been a crime to curse or use opproprious language about the public officers of our democratic republic. If, for instance, the present ordinance had made it a crime wantonly to curse or revile members of the United States Supreme Court or of the state judiciary (or the Governor, or the legislators or any other public officer or serveant), as well as the police, I am certain that not one of the majority would deem such an enactment constitutional. The right to criticize our public officers, be they judges or policemen, has, since our earliest days, been deemed a basic right of all Americans. The harshness or unfairness of language used in such critical commentary does not remove it from protection of our constitution. Freedom of

speech is protected not only for our newspapers and politicians, but also for our citizens on back streets of slum areas.

Although it is immaterial to the issue before use (since the enactment is invalid on its face), I must emphasize once again that the sole action of the defendant hereby punished was her use of obscene language toward the policemen after they had arrested her son. She is not being prosecuted for public obscenity. There is no suggestion in the limited record in this court that such language had any tendency to cause a fight or public disturbance or to interfere with the police in the performance of their duties.[5]

To repeat, the United States Supreme Court has reversed this court's prior rejection of the attack on the ordinance for being overbroad in scope and violative of the First Amendment. It is not our function to refuse to apply the direct ruling of the nation's high court because we disagree with it. Orderly processes of adjudication and the rule of law suffer when an inferior tribunal refuses to follow the law as enunciated by a higher court.

I therefore respectfully dissent.

* * * *

[5] It is to be noted that other statutes are available to punish conduct which actually hampers law enforcement. See, e.g., La.R.S. 14:108 (resisting an officer), La.R.S. 14:111 (assisting an escape), and La.R.S. 40:1390 (interference with state police officers in the performance of their duties).

[6] On October 24, 1972, in an as yet unreported decision (docket No. 71-6627), the United States Supreme Court again reversed a majority of this court's similar holding in City of New Orleans v. Martin, 260 La. 691, 257 So.2d 152 (1972) that the ordinance was unconstitutional.

SUPREME COURT OF THE UNITED STATES

No. 72-6156

MALLIE LEWIS, APPELLANT

v.

CITY OF NEW ORLEANS

ON CONSIDERATION of the motion of the appellant for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

June 4, 1973

SUPREME COURT OF THE UNITED STATES

No. 72-6156

MALLIE LEWIS, APPELLANT

v.

CITY OF NEW ORLEANS

APPEAL FROM the Supreme Court of the State of Louisiana.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

June 4, 1973

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6156

MALLIE LEWIS,

Appellant,

v.

CITY OF NEW ORLEANS,

Appellee.

APPEAL FROM THE SUPREME COURT OF LOUISIANA

APPELLANT'S BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6156

MALLIE LEWIS,

Appellant,

v.

CITY OF NEW ORLEANS,

Appellee.

APPEAL FROM THE SUPREME COURT OF LOUISIANA

APPELLANT'S BRIEF

THE PREVIOUS OPINIONS

This case comes before the Court for a second time. The latest opinion of the Louisiana Supreme Court, issued pursuant to a remand by this Court, is reported at 263 La. 809, 269 So.2d 450 (1972) (A. 47-63). The memorandum opinion of this Court directing that remand is reported at 408 U.S. 913 (1972) (A. 45). The

original memorandum opinion of the Louisiana Supreme Court from which the first appeal to this court was taken is reported at 257 La. 993, 244 So.2d 860 (1971) (A. 44). The opinion of the Criminal District Court for the Parish of Orleans is unreported and is printed in the Appendix at 43.

JURISDICTION

This is an appeal from the Supreme Court of Louisiana, the highest court of the State of Louisiana. Jurisdiction is conferred upon this Court by 28 U.S.C. §1257(2) since this case involves the validity under the Constitution of the United States of a city of New Orleans ordinance and the decisions below have been in favor of the ordinance's validity. The judgment of the Supreme Court of Louisiana was entered on November 6, 1972; notices of appeal were filed in the Supreme Court of Louisiana and the Criminal District Court for the Parish of Orleans on January 31, 1973 and February 1, 1973 respectively; the jurisdictional statement was filed and the appeal docketed on February 5, 1973; all within the ninety day period prescribed by Rule 11 and Rule 13 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves the First Amendment and Section One of the Fourteenth Amendment to the Constitution of the United States and Section 49-7 of Ordinance No. 828 M.C.S., known as the Code of the City of New Orleans of 1956. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Section One of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 49-7 of Ordinance No. 828 M.C.S., known as the Code of the City of New Orleans of 1956, provides:

It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.
"Code of the City of New Orleans, General Ordinances," Michie City Publications Co., Charlottesville, Virginia; page 641 (A. 6).

QUESTIONS PRESENTED

Is a New Orleans ordinance making it unlawful "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty" unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendment and has that ordinance been constitutionally applied to the appellant in the proceedings below.

STATEMENT OF THE CASE

On January 3, 1970, the appellant Mallie Lewis was arrested for violating the ordinances of the City of New Orleans by reviling the police, 828 M.C.S. 49-7, and resisting arrest, 828 M.C.S. 49-2. She was charged with these offenses by affidavits filed with the Municipal Court for the City of New Orleans. (A. 3-6). On April 17, 1970, she was tried before a judge without a jury,[1] was found guilty of both charges, and was sentenced to pay a fine of ten dollars or to serve ten days in jail on each charge. (A. 7-42). Appellant moved to arrest the judgment of the Municipal Court on the ground that Section 49-7 violated the Federal Constitution in that it was vague and overbroad both on its face and as applied; the motion was denied.[2] (R. 49).

Appellant filed an appeal with the Criminal District Court for the Parish of Orleans, which has appellate jurisdiction over the Municipal Court.[3] (R. 50-51). On December 15, 1970, the Criminal District Court affirmed

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[1] The maximum penalty for each offense is ninety days in jail and/or a one-hundred dollar fine. Under Louisiana law, providing for trial by a jury only when the possible penalty exceeds five-hundred dollars or six months imprisonment, Mrs. Lewis had no right to a jury trial. LSA - C.Cr.P., Art. 779.

[2] Under Louisiana jurisprudence a citizen has a right to resist an unlawful arrest. *City of Monroe v. Ducas*, 203 La. 971, 14 So.2d 781 (1943); *State v. Lopez*, 250 La. 108, 235 So.2d 394 (1970). Appellant's attack on her arrest and conviction for reviling the police thus indirectly brings into question, on state law grounds, her arrest and conviction for resisting.

[3] LSA - Const., Art. VII, Sec. 82, 94. The appellate jurisdiction of the Criminal District Court extends to questions of both law and fact; the appeal is based only on the record and evidence in the Municipal Court and is not a trial de novo. *Id.*

the conviction and sentence specifically addressing the constitutional issue and finding Section 49-7 "not vague or overbroad." (A. 43).

Appellant sought to invoke the supervisory jurisdiction of the Louisiana Supreme Court[4] and applied to that Court for a writ of certiorari. (R. 76-85). On March 10, 1971, the Louisiana Supreme Court refused to grant the writ, holding, with one justice dissenting, that the judgment of the Criminal District Court was correct. *City of New Orleans v. Lewis*, 257 La. 993, 244 So.2d 860 (1971). (A. 44).

On June 7, 1971, appellant docketed her first appeal with this Court. *Lewis v. City New Orleans*, No. 70-5323. On June 26, 1972, this Court vacated the judgment of the Louisiana Supreme Court and remanded this matter for reconsideration in light of *Gooding v. Wilson*, 405 U.S. 518 (1972). 408 U.S. 913 (1972) (A. 45-46).

On remand the Louisiana Supreme Court on November 6, 1972 affirmed appellant's convictions for reviling the police and resisting arrest and held the ordinance constitutional; three of seven justices dissented. *City of New Orleans v. Lewis*, 263 La. 809, 269 So.2d 450 (1972). (A. 47-63). Because the case was originally before the Louisiana Supreme Court on an application for a writ of certiorari, which application was denied, the Louisiana Supreme Court did not have before it the trial court record, particularly the transcript, and so had no sure knowledge of what appellant's actions consisted or of the attendant circumstances. *City of New Orleans v. Lewis, supra*, 269 So.2d at 451, fn. 1. (A. 47).

From this second decision of the Louisiana Supreme Court appellant filed the instant appeal. Mrs. Lewis is

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[4] LSA - Const., Art. VII, Sec. 10.

presently free on the suspensive appeal bond originally filed with the Municipal Court. (R. 50-51).

The facts and circumstances surrounding the appellant's arrest were disputed. The trial testimony upon which her convictions were based shows the following. In the late afternoon of January 3, 1970 Mallie Lewis' son, Joseph Lewis, Jr., was arrested by the police. When Mrs. Lewis and her husband, Joseph Lewis, Sr., learned of the arrest they went to the scene where their son was being held in a police car, first Mr. Lewis then Mrs. Lewis. One of the officers on the scene, apparently involved in some way in the arrest, was Officer Berner. When the Lewises arrived on the scene their son told each of them that he was afraid the police were going to beat him. (A. 9, 26,33). Joseph's declarations combined with the fact that their son was kept in the patrol car for over an hour and a half without being taken to the lockup made the Lewises concerned about their son's well being. (A. 26,33-34,40). At one point Mr. Lewis asked the police why they were holding Joseph and was told, "if you want to find out follow us to the lockup." (A. 26). While Mr. Lewis was waiting for his son to be taken to the lockup he was told by Officer Berner to move away, a request he complied with and which he subsequently communicated to his wife. (A. 26,33).

Eventually the police officers prepared to transport Joseph to the lockup. Because of their concern about Joseph and upon the suggestion of one of the police officers, the Lewises attempted to follow their son to the lockup. (A. 26,33). The first car to leave was the patrol car carrying Joseph; then came the patrol car carrying Officer Berner; then came the Lewises in their pick-up truck. (A. 26,33,40). The Lewises attempted to keep sight of the car carrying their son but because Officer

Berner's car was between them and was traveling slowly, they eventually lost sight of the first car. (A. 26-27, 33-34). At about this time Officer Berner pulled his car off the highway and allowed the Lewises' truck to pass; the Lewises meanwhile, having lost the first car, decided to go directly to the lockup. Officer Berner then pulled his car back onto the highway and stopped the Lewises' truck. (A. 27,34). There was no testimony that prior to this stop either Mr. Lewis or Mrs. Lewis had in any way by word or action interfered with or hindered the police in any of their activity.

As to the events following the stop of the truck there is a sharp divergence in testimony. According to Officer Berner he stopped the truck to find out why the Lewises were following him. (A. 8). Addressing Mr. Lewis as "cap," he asked this of Mr. Lewis when Mr. Lewis got out of the truck. (A. 19) When Mr. Lewis responded that he was trying to find out where his son was, Officer Berner said that he didn't have his son and asked Mr. Lewis to produce a driver's license. At this time Mrs. Lewis got out of the truck and according to Berner started yelling questions about the whereabouts of her son. Berner testified that he instructed Mrs. Lewis to return to the truck whereupon Mrs. Lewis said, "you god damm m.f. police—I am going to Giarrusso [the Superintendent of Police] to see about this." Berner testified further that at this point he told Mrs. Lewis she was under arrest, that Mrs. Lewis went to get back in the truck, and that as she did so he took hold of her, an act she resisted.[5] (A. 8). Defense counsel was not permitted by the trial court to

[5] Mr. Lewis was alleged to have assisted Mrs. Lewis in resisting the arrest and was himself arrested and charged with assault. He was tried jointly with the appellant, Mallie Lewis; the charge against him, however, was dismissed. (A. 24, 41).

cross-examine Berner about his participation in and his knowledge of the earlier incident involving the arrest of the Lewises' son, Joseph. (A. 10-17). There was no testimony or evidence that in any way suggested that the alleged utterance of Mrs. Lewis was regarded by Berner as particularly provocative or that he was in any way inclined to respond in a violent manner. Indeed the calm reaction of Officer Berner, "Lady you are going to jail—you are under arrest" suggests quite the contrary. (A. 8). Similarly there was no evidence that the utterance prevented Berner from performing his duty or that it was overheard by any member of the public.

The version of the events following the stop as testified to by the Lewises was far different from Officer Berner's account. According to the Lewises as soon as Berner stopped them he declared that he was going to show them that they couldn't follow the police all over the streets and started cursing Mr. Lewis. (A. 27). When Mrs. Lewis got out of the truck and asked about her son, Officer Berner ordered her to "get your black ass in the goddamned car" and continued to curse the Lewises using such terms as "black son of a bitch" and "black mother fucker." (A. 27,34-35). When Mrs. Lewis protested that she was going to see Superintendent Giarrusso, Berner told her she was going to jail and at that point attempted to arrest her. (A. 35). Mrs. Lewis denied using any obscene language to Berner and specifically denied using the phrase "god damn m.f. police." (A. 34,37-38).

SUMMARY OF ARGUMENT

Mallie Lewis was convicted of reviling the police in violation of Section 49-7 of the New Orleans City Code (A. 6). At the time of her trial no limiting construction

had been placed upon the ordinance and no interpretation was made by the trial court. The ordinance as written is a broad proscription of all opprobrious language and is little more than a law designed broadly to protect the sensibilities of the police. As written it encompasses both speech which is protected by the First Amendment and speech that may properly be prohibited. It is as written vague and overbroad. Since it is impossible to determine by what standard the trial judge measured the appellant's speech the conviction must be reversed whether or not there has been a subsequent narrowing construction that comports with the First Amendment.

There has been in fact no narrowing construction of the ordinance and so even in light of the opinion of the Louisiana Supreme Court on remand, the ordinance still remains vague and overbroad. The opinion of the Louisiana Supreme Court is nothing other than an attempt to justify the facial overbreadth of the ordinance. The Louisiana Supreme Court although paying lip service to the concept of "fighting words" has maintained the broad proscription of all reviling, cursing, and obscene and opprobrious language and has not read into the statute a requirement that the language be likely to provoke an immediate violent response. The ordinance thus continues to proscribe a broader class of language than that countenanced by *Gooding v. Wilson*, 408 U.S. 518 (1972).

The apparent justifications of the Louisiana Supreme Court for maintaining such a broad proscription against speech are untenable. Although it is true that some speech may amount to an interference and thus prevent the police from performing their duty, that fact cannot justify an ordinance that proscribes all speech. The ordinance does not have a functional relevance to this

otherwise legitimate goal because it proscribes all opprobrious language, whether or not effecting an interference, and further because it fails to proscribe other varieties of language which may equally under certain circumstances effect an interference. Legitimate state objectives cannot justify an ordinance which sweeps far broader than is necessary to accomplish those objectives. Similarly, the ordinance cannot be justified as a regulation of speech consistent with the state's power, while not to prohibit the content of speech, to regulate the time, place and manner of its utterance. The ordinance is broadly written to apply to a police-citizen encounter at any time and at any place. The circumstances of police operations are not such that all opprobrious speech is necessarily incompatible with the police activities. To the contrary much police activity is necessarily violent, tumultuous, and indelicate; the utterance of certain languge at the time of such activity can hardly be said to endanger that activity.

Even if the Louisiana Supreme Court has narrowed the ordinance to "fighting words" it has not done so in a fashion that insures that the ordinance will not be applied to language that is protected by the First Amendment. Although it may be possible that certain opprobrious language uttered among civilians may per se amount to "fighting words," this approach cannot satisfactorily be applied to citizen-police encounters because of the policeman's higher degree of training and because of the unique circumstances of such encounters. Language which in other circumstances might amount to fighting words will not be such when uttered by a citizen to a police officer without any intent to provoke a violent response, under circumstances such that the officer cannot reasonably be expected to interpret the language as having an intent to provoke, and under circumstances

such that there is no likelihood of a violent response by the police officer. Language uttered under these circumstances is a protected expression of an emotional feeling, and although superficially appearing to be "fighting words" such language poses no danger to society or to the police. The failure of the Louisiana Supreme Court to require a focus on the circumstances surrounding an opprobrious utterance to the police and its implicit holding that certain opprobrious language is in all circumstances "fighting words" leaves the ordinance still vague and overbroad.

The actual application of the "fighting words" standard to the facts of the instant case is unconstitutional. The utterance alleged here might well be "fighting words" if uttered in a personally provocative fashion without any other apparent purpose, for example in the course of a chance meeting. Here, however, the words were uttered by an emotionally upset woman, who felt aggrieved by specific police conduct directed to her and her family; the words were plainly uttered not to provoke the officer but to give vent to otherwise inexpressible emotions; the officer had no reason to believe that she was attempting to provoke him; and in light of the nature of the encounter there was no reasonable likelihood that the officer would be provoked.

ARGUMENT

I:

AS WRITTEN THE NEW ORLEANS REVILING THE POLICE ORDINANCE MAKES UNLAWFUL A BROADER CLASS OF SPEECH THAN "FIGHTING WORDS." ABSENT A LIMITING CONSTRUCTION, THEREFORE, IT IS UNDER *GOODING v. WILSON* UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Appellant was tried and convicted of reviling the police in violation of an ordinance which reads as follows:

> "It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to a member of the city police while in the actual performance of his duty." (A. 6).

This ordinance quite clearly purports to regulate pure speech. As such it cannot stand unless it is carefully and specifically limited to those narrowly defined classes of speech that are beyond the scope of the First Amendment. *Cohen v. California*, 403 U.S. 15 (1971); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). If the ordinance does not clearly delineate the contours of its proscription it is vague; and if it applies to speech that is protected, speech not within the exceptions to the First Amendment, it is overbroad. In either event the ordinance is unconstitutional under the First and Fourteenth Amendments and appellant's conviction must be reversed whether or not appellant's speech was itself protected. *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Gooding v. Wilson*, 405 U.S. 518 (1972); See

also, Note, "The Overbreadth Doctrine," 83 Harv. L. Rev. 844 (1970); Note, "The Void for Vagueness Doctrine in the Supreme Court," 109 U. Pa. L. Rev. 67 (1960).

Unless the limitation of this ordinance to language that involves the police provides a basis for either broadening or narrowing the class of speech which may be proscribed (See Part IV, *infra*, pp. 24-29) it is immediately clear that this ordinance must be tested against the standards enunciated in *Gooding v. Wilson, supra*. There this Court struck down as vague and overbroad a Georgia statute making it unlawful,

> "... without provocation [to] use to or of another, and in his presence ... opprobrious or abusive language tending to cause a breach of the peace." Georgia Code Ann. §26-6303.

The statute was invalid in that, neither as written nor as construed, was it limited to "fighting words" but that instead it encompassed language, that while offensive and obnoxious, was not likely to provoke an "immediate violent response". *Gooding v. Wilson, supra* at 528.

The similarity between the New Orleans ordinance and the Georgia statute is clear. There was no effort in *Gooding v. Wilson* to defend the Georgia statute as written, the State admitting and the Court finding that it could be upheld only if there had been a limiting construction by the state courts. *Id*, 405 U.S. at 520,524. It would accordingly appear beyond dispute that the New Orleans ordinance is as written plainly unconstitutional. The ordinance here suffers from all the defects of the Georgia statute and more. Unlike the Georgia statute the ordinance is not even limited to face-to-face situations but rather encompasses words spoken merely "with reference to" a police officer; the ordinance is thus

facially applicable to certain forms of purely private conversation where there is no attendant danger of violence. Again unlike the Georgia statute, the ordinance here embodies not even the slightest requirement that the words tend to cause a breach of the peace. The ordinance's reference to a breach of the peace is nothing more than a legislative declaration that opprobrious words are per se illegal and per se a breach of the peace. The ordinance apparently reflects a judgment that unseemly language can be outlawed simply because it is unseemly, with no further showing required. This position, of course, has been thoroughly rejected. *Cohen v. California, supra; Gooding v. Wilson, supra; Terminiello v. Chicago, supra.* As it is written the New Orleans ordinance contains no intimation that it is restricted to face-to-face utterances of language so provocative that it is likely to bring about an immediate violent response; indeed the ordinance proscribes a much broader range of speech than does the Georgia statute. As written Section 49-7 is not a law "carefully drawn to punish only unprotected speech," *Gooding v. Wilson, supra* at 522, but instead it is so written as to be "easily susceptible to improper application." *Id* at 528.

II.

AT THE TIME OF APPELLANT'S TRIAL THERE HAD BEEN NO NARROWING CONSTRUCTION OF THE ORDINANCE BY ANY LOUISIANA COURT AND NONE WAS ATTEMPTED BY THE TRIAL COURT. THE APPELLANT'S CONVICTION MUST THEREFORE BE REVERSED, WHETHER OR NOT THERE HAS BEEN A SUBSEQUENT INTERPRETATION, BECAUSE IT IS NOT CLEAR BY WHAT STANDARDS THE TRIAL COURT APPRAISED HER SPEECH.

At the time the appellant was charged, tried, and convicted for reviling the police there had been no construction or interpretation of the ordinance. To counsel's knowledge the instant case is the first case involving the reviling ordinance to have gone before any appellate court in Louisiana. Nor, to counsel's knowledge were there any Louisiana cases interpreting or applying ordinances similar to the instant one. Accordingly when the appellant was tried in 1970, she was tried under the plain terms and meaning of the ordinance, there having been no prior guidance given to the trial court by any of the higher courts in Louisiana.[6]

Since the case was tried without a jury, there are no jury instructions by which we can ascertain the standard followed by the trial court in determining the guilt of the appellant. The record, however, does suggest what one would otherwise presume, that the trial judge followed

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[6] There is one other Louisiana case involving the ordinance. *City of New Orleans v. Martin*, 260 La. 691, 257 So.2d 152 (1972); vacated and remanded, 409 U.S. 944 (1972). *Martin*, however, was both tried and appealed after the instant case. On appeal it was summarily affirmed by both the Criminal District Court and the Louisiana Supreme Court. No decision has yet been rendered pursuant to the remand.

the plain wording of the ordinance. See, e.g., the trial dialogue at A. 15, "Court: Prove the person didn't revile the police. *That's the whole case.*" (emphasis added).

Whether or not there has now been a constitutionally limiting construction of the ordinance (See Part III, *infra*, pp. 19-24), appellant's conviction cannot stand for she was tried under the ordinance as written, under an ordinance which made unlawful both protected and unprotected conduct. *Shuttlesworth v. Birmingham*, 382 U.S. 87, 92-93 (1965); *Street v. New York*, 394 U.S. 576, 585-587 (1969); *Ashton v. Kentucky*, 384 U.S. 195, 198, (1966); *Bachellar v. Maryland*, 397 U.S. 564, 570-571 (1970). Both *Shuttlesworth v. Birmingham, supra*, and *Street v. New York, supra*, were judge tried cases in which it was impossible to ascertain the basis for the lower court's judgment. The language of this Court in *Shuttlesworth v. Birmingham, supra* at 92, applies with equal force here.

> "The present limiting construction of the [ordinance under which Shuttlesworth was convicted] was not given until ... two years after the petitioner's conviction in the present case ... the trial court in the present case was without guidance from any state appellate court as to the meaning of the ordinance.
>
> The trial court made no findings of fact and rendered no opinion. For all that appears, that court may have found the petitioner guilty only by applying the literal and unconstitutional terms of the ordinance ... Because we are unable to say that the Alabama courts in this case did not judge the petitioner by an unconstitutional construal of the ordinance, the petitioner's conviction ... cannot stand.

It is impossible to say here whether the trial judge measured the appellant's language by the "fighting words" standard or whether he merely measured it against some standard of general offensiveness. In the instant case we do not have the benefit even of a charging paper that specifies the precise conduct or speech for which the appellant was tried and convicted; we have only an affidavit charging that she violated Section 49-7. (A. 3-4). Compare, *Gooding v. Wilson, supra*, at 519, fn. 1, in which the charging paper, an indictment, specified the actual language used, the fact it was spoken in the presence of the person spoken about, and the fact that it tended to cause a breach of the peace. Since the ordinance does not require that the words be spoken without provocation, it is not inconceivable that the appellant was convicted on her admission that she said "you are another one" after Officer Berner allegedly called her a "black mother fucker." (A. 37).

Given the initial as written overbreadth and vagueness of the instant ordinance, appellant was given no fair notice at the time of the trial of what she should defend herself against. Any subsequent interpretation is of no avail to her in planning her defense at the original trial. Quite clearly had trial counsel known that the statute might later be upheld and justified as applying only to "fighting words," his defense would have been different. Officer Berner would have been probed as to his reaction to the words, the nature of his everyday experiences, and the sort of training he had received. Counsel here is not suggesting that if there has been an interpretation, that it was a broadening one, merely that knowledge of the contours of any subsequent interpretation were not fairly chargeable to the appellant at the time of her trial. Appellant at a minimum had a right to be advised of the

precise charge against her, and the essential elements thereof, so that she might adequately and appropriately defend herself. *Cole v. Arkansas*, 333 U.S. 196 (1948), *Gregory v. Chicago*, 394 U.S. 111 (1969). As it is unclear under what standard appellant's conduct was judged by the trial court and as the appellant was given no fair notice as to the elements of the offense with which she was charged, the conviction is invalid whether or not there has now been a saving construction of the ordinance. *Shuttlesworth v. Birmingham, supra; Cole v. Arkansas, supra; Herndon v. Lowry*, 301 U.S. 242 (1937); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

III.

THE LOUISIANA SUPREME COURT HAS FAILED TO LIMIT THE SWEEP OF THE ORDINANCE TO "FIGHTING WORDS" AND THE ORDINANCE, THEREFORE, REMAINS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

The opinion of the Louisiana Supreme Court on remand from this court, *City of New Orleans v. Lewis*, 263 La. 809, 269 So.2d 450 (1972) has failed to limit the scope of the ordinance's proscription to fighting words; the ordinance now, just as it did before the first appeal to this Court, remains susceptible of application to words which while insulting, opprobrious, or obscene[7] are not such as would likely provoke an immediate violent response.

The Louisiana Supreme Court opinion is not a hallmark of clarity. Having been directed to reconsider this

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[7] Reference to the word "obscene" both in this brief and in the ordinance is in the conventional sense not the constitutional sense. Most assuredly the ordinance is not directed to speech which appeals to anyone's purient interest. Cf. *Cohen v. California, supra*, at 20.

case under *Gooding v. Wilson*, it appears that the court sought more to distinguish the present ordinance and to uphold it on its face because of its limited application only to language spoken of the police than it did to limit the breadth of its proscription to "fighting words." Whether limitation of the ordinance to words spoken of the police provides a constitutionally acceptable justification for outlawing all speech that is merely opprobrious and that is not likely to produce a violent response will be considered in Part IV, *infra*, pp. 24-29. The question here is whether the ordinance, in light of the opinion below, still outlaws more than "fighting words." Although the opinion does pay lip service to the concept of "fighting words," it totally fails to focus on the meaning of the standard as applying strictly to language that is likely to provoke an immediate violent response. Essentially the opinion declares that all reviling, cursing, and obscene and opprobrious language is per se "fighting words." This is directly contrary to this Court's holding in both *Cohen v. California, supra,* and *Gooding v. Wilson, supra*. The court below addressed the ordinance as written and declared that "...what *is* prohibited are 'fighting words' "; the ordinance "... *is* narrowed to 'fighting words' ". 269 So.2d at 456 (A. 56). (emphasis added). It did not construe the ordinance and give the lower courts guidance as to how to measure a defendant's speech; instead it authorized convictions whenever the court found that the words uttered were abusive or opprobrious. That this is so can be seen by examining portions of the court's opinion which repeatedly declare that the utterance of language is alone sufficient to convict:

"... it stands to reason that wantonly cursing or reviling, or using obscene or opprobrious language

toward or with reference to any police officer while in the actual performance of his duty is a breach of the peace." 269 So.2d at 454. (A. 52-53).

"Wantonly cursing, reviling, or using obscene or opprobrious words are not protected means of communication. Prohibiting such is not a restraint of the area of public discussion." 269 So.2d at 456. (A. 56).

"...the prohibitions of Section 49-7 are self-explanatory;... The proscriptions are narrow and specific—wantonly cursing, reviling, and using obscene or opprobrious language." 269 So.2d at 456. (A. 56-57).

In each of these declarations the court below unequivocally reveals its belief that the mere utterance of words can be constitutionally punished.

The failure of the court below either to understand or follow the decision in *Gooding v. Wilson* is evidenced by its discussion of the words "breach of the peace". In *Gooding v. Wilson* the state argued that the phrase "tending to cause a breach of the peace" embodied the "fighting words" standard and gave the statute the necessary element that the words be likely to result in an immediate violent response. *Id* at 524. This Court considered the argument at length and concluded that the term "breach of the peace" had not been sufficiently limited to violent situations but instead had been applied to situations where only someone's tranquillity had been disturbed. *Id* at 525-527. Accordingly the phrase still made it a crime "merely to speak words offensive to some who hear them and so sweeps too broadly" *Id* at 527.

Inexplicably, the court below considered the New Orleans ordinance superior to the Georgia statute because

instead of requiring that the words have some tendency toward a breach of the peace, the New Orleans ordinance provides that "it *shall* be a breach of the peace" 269 So.2d at 453. (A. 51). This comment by the Louisiana Supreme Court underscores that court's failure to focus on the requirement that the words proscribed must only be such as will likely provoke a violent response. The proscription of the New Orleans ordinance is obviously broader than that of the Georgia statute; the Georgia statute at least, with its phrase "tending to cause a breach of the peace," incorporated an element requiring that the words be regarded as offensive by someone. The New Orleans ordinance lacks even this much; the words themselves are a "breach of the peace." Even if no one be offended thereby, the utterance of certain language is unlawful. The court below affirms this absolute rule when it states that since a police officer is one who keeps the peace, it stands to reason that opprobrious language with reference to him is a breach of the peace, 269 So.2d at 454. (A. 52-53), and is therefore punishable.

The failure of the Louisiana Supreme Court's opinion to address itself to that part of the ordinance which appears to proscribe language spoken only with "reference to" the police and not necessarily in their presence again reveals that court's lack of regard for the essential aspect of the "fighting words" standard. There can be no danger of violence if the words are not heard by the person about whom they are spoken; there can be, therefore, no justification under either *Chaplinsky v. New Hampshire* or *Gooding v. Wilson* to outlaw such language. Yet, as the dissenting opinion below of Justice Tate points out, 269 So.2d at 457-460 (A. 57-63) the Louisiana Supreme Court wholly failed to excise this portion of the ordinance.

The opinion of the Louisiana Supreme Court places some emphasis on the appearance in the ordinance of the word "wantonly." The word is several times emphasized in the majority opinion. 269 So.2d at 456 (A. 55-56). That opinion fails however to limit the scope of this word of multiple meanings. Wanton is variously defined as "lacking discipline", "excessively merry", "unchaste", "marked by or manifesting heedless disregard of justice or of the rights of others", "willfully malicious", "unrestrained", and "extravagant". Webster's Third New International Dictionary (1961). Nowhere does the opinion indicate which or what content is to be given to this modifier, and in any event no customary definition of "wantonly" embodies the element that words thus spoken are words which are likely to produce an immediate violent response.

Appellant submits that the opinion of the Louisiana Supreme Court below clearly shows no intent to limit the written scope of the ordinance; to the contrary that court adopted a per se rule that all opprobrious language spoken with reference to a police officer was punishable. Instead of limiting the statute by construing it to mean that all opprobrious language that amounts to "fighting words" is punishable it has upheld the ordinance as written by saying that all opprobrious language is per se "fighting words." The opinion thus emasculates the holdings of *Gooding v. Wilson, supra; Cohen v. California, supra;* and *Chaplinsky v. New Hampshire, supra.*

At a bare minimum the opinion below is obscure and provides no sure guidance to the Municipal Court in New Orleans as to the constitutional limits of the ordinance. If indeed the opinion below is a narrowing construction of the ordinance it is not one so precisely and specifically drawn as to insure that the ordinance will not in the

future be applied to protected speech. *Gooding v. Wilson, supra; Chaplinsky v. New Hampshire, supra; Cantwell v. Connecticut, supra; Speiser v. Randall*, 357 U.S. 513 (1958); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963). It must be remembered that this ordinance is enforced at the lowest level of the judiciary, where the punishment meted out is in the order of a $10.00 fine; the real enforcement is perhaps in the actuality of an arrest by the police and the temporary incarceration awaiting bond. In these circumstances it would be pure sophistry to believe that the opinion of the Louisiana Supreme Court on remand had so clearly narrowed the overbreadth of this ordinance that the New Orleans police and the Municipal Court are now properly instructed as to its permissible scope.

IV.

BECAUSE THE ORDINANCE FAILS TO FOCUS SPECIFICALLY ON A PARTICULAR HARM THAT MAY RESULT WHEN OPPROBRIOUS LANGUAGE IS SPOKEN TO THE POLICE, THE MERE LIMITATION OF THE ORDINANCE TO LANGUAGE SPOKEN ONLY OF OR TO THE POLICE PROVIDES NO ACCEPTABLE JUSTIFICATION FOR TOTALLY CONDEMNING A CLASS OF SPEECH BROADER THAN "FIGHTING WORDS."

The mere fact that Section 49-7 applies only to language spoken of a police officer in the performance of his duty does not justify a proscription that sweeps broader than "fighting words." The opinion of the Supreme Court of Louisiana apparently holds otherwise and suggests that the broad proscription of opprobrious language is validated by the state's "interest in preserving the efficient and effective operation of the police force", 269 So.2d at 454 (A. 53), and by the fact that such

language is "basically incompatible with the officer's activities and the place where such activities are performed," 269 So.2d at 456 (A. 56).

This Court has on many occasions upheld statutes that indirectly regulate the exercise of First Amendment expression either because the nonexpressive elements thereof impinge upon a vital governmental interest or because the manner of the expression is unreasonable in light of and incompatible with the surrounding circumstances. *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Gregory v. Chicago*, 394 U.S. 111, 117-121 (Black, J., concurring); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Colten v. Kentucky*, 407 U.S. 104 (1972); *Grayned v. City of Rockford*, 408 U.S. 104 (1972). To support a statute under such a theory however, it is mandatory that the statute assert the particular interest deemed so important as to restrict the First Amendment exercise and that it focus only on those elements of the First Amendment exercise which impinge upon that interest.

> "...the Court has repeatedly warned States and governmental units that they cannot regulate conduct connected with [First Amendment] freedoms through use of sweeping, dragnet statutes that may, because of vagueness, jeopardize these freedoms.... the Constitution does not bar enactment of laws regulating conduct, even though connected with speech, press, assembly, and petition, *if such laws specifically bar only the conduct deemed obnoxious and are carefully and narrowly aimed at that forbidden conduct. Gregory v. Chicago*, 394 U.S. 111, 117-18 (1969) (Black, J., concurring) (emphasis added).

The fault of the ordinance here is that it is not restricted in its application to those elements and consequences of speech to a police officer that may indeed be lawfully prohibited. The ordinance in its great breadth has no functional relevance to the legitimate interests that the State may narrowly protect.[8] Appellant has no doubt that to detain a police officer on the street and repeatedly to harangue him with words, whether offensive or inoffensive, may effectively impair the officer's ability to perform his duty and so interfere with an important state interest. Precisely such speech and conduct was found unprotected in *Colten v. Kentucky*, *supra*, where this Court emphasized that the State had a "legitimate interest in enforcing its traffic laws and its officers were entitled to enforce them free from possible interference or interruption from bystanders, even those claiming a third party interest in the transaction", *Id*, 407 U.S. 109. There however the conviction was obtained under an ordinance that as written provided that the conduct be done with an "intent to cause public inconvenience, annoyance or alarm", *Id*, 407 U.S. 108, and that as interpreted required that there either be no intent to exercise a constitutional right or that the interest to be advanced by that exercise be miniscule in comparison with the attendant inconvenience, annoyance and alarm. *Id*, 407 U.S. 111. The ordinance here clearly lacks any such focus. If the intent were indeed to prevent interference with the police the statute would not be limited only to opprobrious and obscene language, for

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[8] Compare, New Orleans ordinance 828 M.C.S. 49-6, providing that, "It shall be unlawful and shall be considered a breach of the peace for any person willfully to obstruct, hinder or unlawfully interfere with any member of the city police while in the performance of his duty."

any language can under certain circumstances constitute an interference. See, e.g., *Colten v. Commonwealth of Kentucky, supra*. On the other hand neither all obscene and opprobrious language nor all polite and genteel language will necessarily effect an interference. While it cannot be gainsaid that, "wanton interference with a policeman while he is endeavoring to discharge his duties creates a threat to the community at large," 260 So.2d at 454 (A. 53); it does not logically follow, however, that the State may constitutionally proscribe all obscene and opprobrious language. Just as the fact that some opprobrious language addressed to a citizen may amount to "fighting words" does not justify a condemnation of all opprobrious language; similarly the fact that some opprobrious language addressed to an officer may effect an interference cannot justify a total ban on all such language. Although preventing interference with the police is a legitimate state objective, the ordinance is not narrowly tailored to that objective; it condemns equally language which does interfere and language which does not.

The ordinance's proscription of a broader class of speech than "fighting words" cannot be upheld as a reasonable regulation of the time, place, and manner of speech. The court below apparently seized upon this doctrine as most recently stated in *Grayned v. City of Rockford, supra*, to uphold the instant ordinance.[9] Under the test "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford, supra*, at 116, this Court has upheld bans on picketing at courthouses, *Cox v. Louisiana, supra*, gatherings at prisons, *Adderley v. Florida, supra*, and noisy

[9] *City of New Orleans v. Lewis*, 269 So.2d at 455-456

disruptive activity near schools, *Grayned v. City of Rockford, supra.* The opinion below however reflects little reasoning as to why the court thought the ordinance could be upheld on this basis. Certainly the usual meeting of a citizen and a police officer, especially a citizen whom the police are seeking to arrest or investigate, is not usually so sedate and tranquil, like the atmosphere of a school, *Grayned v. City of Rockford, supra, Tinker v. Des Moines School District*, 393 U.S. 503 (1969), a library, *Brown v. Louisiana*, 383 U.S. 131 (1966), or courthouse, *Cox v. Louisiana, supra*, that the utterance of certain language will automatically destroy the purpose of the meeting. Quite the contrary is true; as we shall show in Part V, *infra* pp. 29-39, many of the meetings between citizen and police are tumultuous, already violent, situations. It can hardly be believed that the utterance of opprobrious language by an arrested subject being placed in custody or of a citizen being pursued for arrest is likely to deter the officer or defeat his purpose. If the citizen may use opprobrious but not "fighting words" to another citizen, it is hard to see some unique aspect of the citizen-police encounter that suggests that opprobrious language is universally "incompatible" with that encounter.

Assuming arguendo that opprobrious language might under certain circumstances effectively prevent a police officer from discharging his duties and that opprobrious language might under certain circumstances be incompatible with an officer's duties, the ordinance below nevertheless totally fails to focus on those limited objectives; its broad proscription, therefore, of all opprobrious speech under all circumstances cannot be sustained.

V.

IN THE CONTEXT OF AN ORDINANCE LIMITED TO WORDS SPOKEN OF OR TO THE POLICE THE "FIGHTING WORDS" STANDARD MUST BE EITHER WRITTEN, INTERPRETED OR APPLIED SO AS NOT TO PERMIT THE PUNISHMENT OF LANGUAGE WHICH POSES NO DANGER TO SOCIETY OR TO THE POLICE AND WHICH IN FACT FULFILLS A LEGITIMATE FIRST AMENDMENT INTEREST BECAUSE UTTERED ONLY AS AN EMOTIONAL RESPONSE, WITHOUT SPECIFIC INTENT TO PROVOKE A VIOLENT REACTION, UNDER CIRCUMSTANCES SUCH THAT THE OFFICER CANNOT REASONABLY BE EXPECTED TO INTERPRET THE LANGUAGE AS HAVING AN INTENT TO PROVOKE, AND UNDER CIRCUMSTANCES SUCH THAT THERE IS NO LIKELIHOOD OF A VIOLENT RESPONSE. THE ORDINANCE HERE, BOTH AS WRITTEN AND AS CONSTRUED, IS NOT THUS CONSTITUTIONALLY LIMITED NOR HAS IT BEEN SO APPLIED IN THE INSTANT CASE.

The proposition that "fighting words" are not protected by the First Amendment is one that has been accorded consistent deference. *Chaplinsky v. New Hampshire, supra; Cohen v. California, supra; Bachellar v. Maryland, supra; Street v. New York, supra; Gooding v. Wilson, supra.* The concept embodies a form of the clear and present danger doctrine and is designed to permit speech that is merely annoying, disturbing, or insulting, while excising speech which is likely to result in an immediate violent response. Cf. *Terminiello v. Chicago, supra*. Under *Gooding v. Wilson, supra*, and *Cohen v. California, supra*, it is now clear that it is this tendency to a violent response that alone justifies this exception to the First Amendment; the intrinsic wording, no matter

how offensive or obscene, does not in and of itself, without more, warrant punishment.

Given the rationale of the "fighting words" doctrine it is clear that properly applied it should never result in the punishment of language uttered without danger of violence. The actual application of the standard is not however an easy matter, and as the opinion below suggests there is an inclination on the part of some courts simply to declare that all obscene and insulting language constitute "fighting words." The opinions of this court provide little specific guidance. In *Chaplinsky v. New Hampshire, supra* at 574, this Court said:

> "Argument is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation."

At the same time this Court, in *Gooding v. Wilson, supra* at 525, has said of the words, "God damn you, why don't you get out of the road."

> "Plainly, although 'conveying . . . disgrace' or 'harsh insulting language' these were not words 'which by their very utterance . . . tend to incite an immediate breach of the peace'."

Although the original *Chaplinsky* "fighting words" standard applies to all language that is "likely to cause the average addressee to fight," *Chaplinsky v. New Hampshire, supra*, at 573, there is no constitutional or practical justification for defining or applying the standard so broadly when the words are spoken only to police officers. The Model Penal Code has adopted a distinction between the sort of conduct that will be tolerated when directed to the public and the sort of conduct that will be tolerated when directed only to the

police. This distinction has a constitutional foundation stated as follows:

> "Insofar as the theory of disorderly conduct rests on the tendency of the actor's behavior to provoke violence in others, one must suppose that policemen, employed and trained to maintain order, would be least likely to be provoked to disorderly responses." Model Penal Code §250.1, Comments, p. 14 (Tent. Draft No. 13, 1961).

Appellant does not believe, nor do the distinctions of the Model Penal Code suggest, that in no case should the utterance of mere words to a police officer be punished. But these words must at all times be measured by their real likelihood under the attendant circumstances of provoking violence. It is simply not constitutionally adequate to look at certain words and conclude that they are automatically "fighting words"; the appraisal of the language must be made by considering the circumstances of its utterance.

Since the ordinance here is directed at words uttered only to police officers, and, as the opinion below is at pains to point out, police are a distinct and unique group, it is appropriate at a minimum that the "fighting words" should be measured against a standard of what is likely to provoke the average policeman to violence. Under this standard it is not at all obvious that the words allegedly uttered by the appellant here are proscribed. This is not to say that these same words could never be "fighting words" when addressed only to the police. Both a court's view of the language spoken and the policeman's appraisal of that language can be properly made a factor of the intent with which that language is spoken as evidenced by the circumstances. Such a standard for distinguishing protected conduct from unprotected conduct has been

suggested as long ago as *Smith v. California*, 361 U.S. 147 (1959), where this Court held that the mere possession by a bookseller of obscene material could not be made unlawful without some showing of mens rea. The recent cases of this Court suggest that where the interest in First Amendment expression and the interest of society in preventing some specific harm compete, it is appropriate at least in part to determine whether the line between permissible First Amendment expression and forbidden conduct has been crossed by an appraisal of the actor's intent.[10] This concept is most clearly expressed in *Colten v. Kentucky, supra*, where this Court upheld a conviction for congregating in a public place after an order to move on, upon a state construction that the actor's *predominant intent* must be to cause public inconvenience, alarm, and annoyance. This *predominant intent* must mean that the actor had either no intent to exercise his First Amendment freedom or that his interest in that expression was miniscule. *Colten v. Kentucky, supra* at 111.

The application of such an analysis to words addressed to the police would permit the punishment of willful taunts, calculated to provoke violence, or uttered for no apparent reason other than to raise the possibility of such violence while leaving unrestricted the careless, impulsive utterance of a citizen who feels himself actually aggrieved by specific police conduct directed to him. Although this latter form of speech may be indelicately framed as indeed is alleged here, appellant submits that it is

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[10] See, "A Selective Survey of Supreme Court Decisions in Criminal Law and Procedure," Anthony G. Amsterdam, 5 Crim. Law Bull. 389 (1973), in which Professor Amsterdam reads this Court's recent decisions involving disorderly conduct ordinances as requiring such "ordinances to have a scienter requirement." *Id* at 396.

protected not only because under the circumstances spoken it is not likely to provoke violence but also because there are affirmative First Amendment reasons for allowing such language.

In *Cohen v. California, supra*, at 25-26, Justice Harlan said of the purposes of the free speech guarantee:

> "... we cannot overlook the fact ... that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detailed explication, but otherwise, inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed as Mr. Justice Frankfurter has said, '[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.' *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944)."

The utterance alleged in the instant case, like many perhaps spoken in the course of a police-citizen meeting where the citizen, rightly or wrongly, feels himself aggrieved, is precisely the sort of speech which serves a useful emotive function. It is nothing more than the expression of a pent-up emotion and a sense of frustration, feelings from which all people suffer at varying times and which as civilized persons we are taught not to exhibit physically but to act out in some harmless fashion. The fact that the emotion here was expressed in

the form of indelicate language is under *Cohen v. California, supra*, and *Gooding v. Wilson, supra*, not decisive. Unless amounting to fighting words the message it communicates is as protected as the clever pun or the elegant put-down a Shakespeare or a Churchill might utter in a like situation.

In determining what constitutes "fighting words" in the police-citizen contest, therefore, it is necessary to regard not only the sensibilities of the police officer but also the intent of the actor. It simply cannot be facilely assumed that utterances such as the one being considered here never serve a legitimate communicative function. If in the mind of the actor no violence is intended and if in the mind of the auditor no violent response is considered there is no constitutional justification for outlawing the utterance. The distinctions that the appellant suggests, revolving in part around the actor's intent, would not serve to leave the police vulnerable to a hail of obscenities or turn the streets into a raucous and offensive scenario. The willful taunting and railing of the police, as in a chanting picket line, would be punishable not only because the police might respond violently to such a massing of abuse[11] but also because no justification or explanation could be offered for such behavior other than an intent to provoke such violence. Similarly, the single act of walking up to a police officer patrolling the street and verbally abusing him would also be punishable because a similar intent to provoke would be apparent. Language, however, that was impulsively uttered in a stressful situation would be protected both because a violent response would be unreasonable, unwarranted and unexpected and because the words were spoken to express a sudden emotional feeling without a considered

[11] Cf. *Winters v. New York*, 333 U.S. 507 (1948)

intent to provoke. The distinction would not be difficult for either the police or the courts to make. It is not unreasonable to believe that the police officer can comprehend the motivation for an utterance. When a police stop, frisk, interrogation or arrest is in progress, the officer, although he be performing his duty honestly and ably, can full well appreciate that the citizen may probably feel aggrieved and can full well understand the citizen's utterances as expressions of this reaction. Compare, *Thompson v. Louisville*, 326 U.S. 199, at 206 (1960).

In the course of a police officer's duty, he may be forced to do things which while legitimate and justifiable are highly obnoxious to a citizen. Receiving a report that a man in a green car had just shot and killed two people from out of the car window, a police officer might be acting reasonably if he stopped a car closely matching that description and in the immediate neighborhood of the crime, and without time for an explanation harshly shoved the driver up against the car, and immediately frisked him. If the driver of the car was the wrong person, he would doubtless be outraged and inclined to use some condemning language. Such a response would not only be understandable, but would doubtless be forseeable in the mind of the policeman and unlikely to provoke violence from him. The language could not by anyone be construed as intending to provoke the officer. On the other hand, when a police officer is suddenly and personally assailed with a torrent of abuse from a citizen with whom he has had no contact, he and the courts might fairly presume that the abuse was intended to provoke him.

In *Williams v. District of Columbia*, 419 F.2d 638 (D.C. Cir., 1969) (en banc) the court suggested the analysis

that the appellant proposes here. Finding that the "circumstances under which words are spoken are of critical importance in deciding whether the Constitution permits punishment to be imposed," 419 F.2d 645, and noting the distinctions of the Model Penal Code the court remarked:

> "A policeman's special powers and training, and his constant exposure to situations where the norms of common speech are not distinguished by unvarying delicacy of expression, leave him less free to react as quickly as the private citizen to a purely verbal assault. In a situation where he is both the victim of the provocative words of abuse and the public official entrusted with a discretion to initiate through arrest the criminal process, the policeman may ordinarily at least be under a necessity to preface arrest with a warning. It would appear that there is no First Amendment right to engage in deliberate and continued baiting of policeman by verbal excesses which have no apparent purpose other than to provoke a violent reaction." 419 F.2d 640, fn. 23.

The reference in this comment to the special powers of the police to make an arrest suggests another reason to insure that in the context of the police-citizen encounter the "fighting words" standard be applied most strictly. Anything less gives the police officer, who is both the victim and the magistrate,[12] unbridled discretion in making arrests; it is this discretion that permits great abuses of the ordinance under consideration here. Cf. *Papachristou v. Jacksonville*, 405 U.S. 156 (1972). For a

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[12] Charges such as the instant one are, in New Orleans at least, filed by direct affidavit by the police officer, without prior review by a District Attorney or magistrate. (A. 3-6).

compilation of cases in which citizens have been dealt with somewhat arbitrarily under ordinances akin to this one, see the Model Penal Code §250.1, Comment at pp. 15-18 (Tent. Draft No. 13, 1961).

Appellant is not suggesting that the "fighting words" standard has no applicability to words spoken to the police; appellant is not suggesting that because of their special training and their high standard of conduct the police should be made vulnerable to all forms of speech. Appellant is merely suggesting a technique that in light of the nature of police-citizen contacts provides a basis for making rational distinctions between speech that is willfully provocative and punishable and speech that poses no danger and fulfills a legitimate First Amendment interest. The opinion of the Louisiana Supreme Court below provides no basis for making these distinctions; thus even if it can conceivably be read as limiting Section 49-7 to some concept of "fighting words," it does so in a fashion so vague as to remain overbroad. It fails to enunciate whether the "fighting words" are to be measured against the sensibilities of the average person or of the average police officer; it fails to draw distinctions between words which, while on their face might provoke even an average officer, would not be expected to do so under a given set of circumstances; and it fails to consider the possibility that some words which in some situations might properly be regarded as "fighting words" in other situations are uttered without any intent to provoke and have a substantial content worthy of First Amendment protection.

Appellant submits that not only is the ordinance still overbroad and vague but also that, under the distinctions made above, her speech was itself protected by the First Amendment and was not properly punishable under the

"fighting words" doctrine. Trial counsel below was not permitted to examine the police officer as to his knowledge concerning the arrest of Joseph Lewis, Jr., although the court did appear to assume that the officer both knew of the reasons for that arrest and knew why the appellant was following him. (A. 14). Mrs. Lewis's son had been arrested; she didn't know why; she had been told to follow the police to the lock-up if she wanted to find out; she was concerned about her son's welfare; one police car drove ahead of her slowly; the police officer suddenly stopped her and her husband and for no apparent reason asked her husband for his driver's license. Assuming she did utter the words attributed to her, she obviously did so as evidence of her personal frustration, not unreasonable and unforseeable in the circumstances and not with the intention of provoking the police officer. Her words were an expression both of her internal anger and her intention to go beyond the individual officer and seek relief from higher officials. Under the analysis suggested above the ordinance therefore, at a minimum, has been unconstitutionally applied because the utterance here was made without any intent to provoke and under circumstances unlikely to result in a provocation; it was therefore protected by the First Amendment.

CONCLUSION

For the above and foregoing reasons the judgments below affirming appellant's convictions should be reversed.

Respectfully submitted,

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SUPREME COURT, U.S.
FILE
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6156

MALLIE LEWIS,

Appellant,

versus

CITY OF NEW ORLEANS,

Appellee.

APPELLEE'S BRIEF ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 72-6156

MALLIE LEWIS,

Appellant,

versus

CITY OF NEW ORLEANS,

Appellee.

APPELLEE'S BRIEF ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

STATEMENT OF THE CASE

On April 17, 1970, in the First Municipal Court for the City of New Orleans, Mallie Lewis was convicted and sentenced to pay fines of $10.00 or to serve terms of ten days each for the crimes of reviling the police and resisting arrest, in violation of New Orleans ordinances 828 M.C.S. 49-7 and 828 M.C.S. 49-2. Alleging the unconstitutionality of the reviling ordinance (828 M.C.S. 49-7), Lewis duly filed an appeal with the Criminal District Court for the Parish of Orleans. On December 15, 1970, that court affirmed Lewis' convictions finding the ordinance constitutional.

Lewis then made application to the Supreme Court of Louisiana for writs. On March 10, 1971, the application was denied. *City of New Orleans v. Lewis,* 244 So.2d 860, 257 La. 993. On June 7, 1971, Lewis lodged an appeal in this Court. On June 26, 1973, this Court vacated the Supreme Court of Louisiana's judgment and remanded the case to the Supreme Court of Louisiana for reconsideration in light of *Gooding v. Wilson,* 405 U.S. 92, 92 S.Ct. 1103 (1972).

On remand the Supreme Court of Louisiana affirmed Lewis's conviction holding the ordinance in question constitutional. *City of New Orleans v. Lewis,* 263 La. 809, 269 So.2d 450 (1972). From that decision, Lewis has filed this appeal before this Court.

ARGUMENT

The Supreme Court of Louisiana has found that this ordinance in question before this Court (828 M.C.S. 49-7) is not unconstitutionally vague and overbroad. That Court has found that the City of New Orleans ordinance and the statute in question in *Gooding v. Wilson,* supra, are not similar, they can be readily distinguished.

The New Orleans ordinance states:

> "It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the City police while in the actual performance of his duty."

The Georgia statute, which was the major issue in *Gooding*, supra, made it an offense for any person ". . . without provocation to use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace". *Gooding*, supra, at 1104.

It is clear that a vital differentiation appears between these two statutes. The second portion of the New Orleans ordinance states that revilings must occur "*while in the actual performance* of his (the policeman's) duty". (Emphasis added) The Georgia statute does not limit opprobrious words or abusive language to the narrow field of reviling the police while he is endeavoring to perform his official functions.

In citing *NAACP v. Button*, 371 U.S. 415 at 433 (1963), this Court stated in *Gooding*, supra: "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity". However, later in the opinion of the Court, this area is defined: "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the state's consitutional power to regulaer can justify limiting First Amendment freedoms". Id at p. 438. The City of New Orleans as an arm of the State of Louisiana has a compelling interest in preserving the efficient and effective operation of its police department, this in turn provides for law and order on the streets. Wanton interference with a policeman while he is endeavoring to discharge his duties creates a threat to the community at large. In *Feiner v. People of the State of*

New York, 340 U.S. 315, 71 S.Ct. 303 (1951), the Court stated, "This Court respects, as it must, the interest of the community in maintaining peace and order on its streets". Also, this Court has noted that, "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order appears, the power of the state to prevent or punish is obvious". *Cantwell v. State of Connecticut*, 310 U.S. 296, 60 S.Ct. 900 (1940). Thus, because a vital State interest here is in question, i.e., the efficient operation of an officer of the law while in the discharge of his duties, the ordinance should not be struck down as intruding on First and Fourteenth Amendment freedoms.

A unanimous decision of this Court is *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 62 S.Ct. 766 (1942), said:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those by which their very utterance inflict injury or tend to incite breach of the peace."

The above cited case deals with a state statute and factual circumstances very similar to the case at bar. In *Chaplinsky*, supra, he appellant was convicted in violation of a statute that read as follows:

> "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

This Court upheld the conviction in *Chaplinsky*, supra, saying at p. 573: "We are unable to say that the statute as thus construed contravenes the constitutional right of free expression".

The line of decisions since *Chaplinsky* have consistently affirmed the state's right to punish "fighting words". In this connection, the Louisiana Supreme Court in its opinion in the case before this Court said at p. 456:

> "We find and believe that is self evidence that what is prohibited (by the ordinance) are 'fighting words' which cannot enjoy the protection of the First and Fourteenth Amendments to the United States Constitution. We find that under the above authorities of the United States Supreme Court it was within the power of the City of New Orleans, as an arm

of the State, to regulate the conduct of any person towards member of the city police while in the actual performance of his duty by prohibiting the use of fighting words to such policemen."

Further, the Louisiana Supreme Court stated:

"The Section definitely does not sweep within its proscriptions all forms of abusive and derogatory speech. The proscriptions are narrow and specific — wantonly cursing, reviling, and using obscene or opprobrious language." Id at 456.

Appellee argues that this Court consider two cases decided by this Court in 1971, *Coates v. City of Cincinati,* 402 U.S. 611, 91 S.Ct. 1686 (1971), and *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780 (1971). Both of these cases strike down local ordinances for being too vague and overbroad. It is contended that both these cases are readily distinguishable from the case at bar.

In *Coates,* supra, the ordinance forbade "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . ." As noted by this Court, "the ordinance is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all". Id at 1688.

In the case at bar, the New Orleans ordinance clearly sets out the standard of conduct that is forbidden, i.e., the wanton cursing, reviling, or using obscene or opprobrious language. This ordinance expressly states that such actions must be directed towards "any member of the City police" and furthermore, "while in the actual performance of his duty". Therefore, it sets a standard of conduct which would necessarily have to interfere with the official execution of a policeman's duties.

This Court in *Coates*, supra, was a markedly divided one. Mr. Justice Stewart delivered the opinion of the Court. Mr. Justice Black filed a separate opinion. Mr. Justice White filed a dissenting opinion in which Mr. Chief Justice Burger and Mr. Justice Blackman joined. Essentially, the Court was divided five to four on the question of whether the ordinance was unconstitutional on its face. Quoting from Mr. Justice Black's separate opinion, Id at 1689, 1690:

> "On the other hand, laws which plainly forbid conduct which is within the power of the State to forbid but also restrict constitutionally protected conduct may be void either on their face or merely as applied in certain instances. As my Brother White states in his opinion (with which I substantially agree) this is one of those numerous cases where the law could be held unconstitutional because it prohibits both conduct which the Constitution safeguards and conduct which the State may constitutionally punish. Thus, the First Amendment which for-

> bids the State to abridge i. edom of speech, would invalidate this city ordinance if it were used to punish the making of a political speech even if the speech were to annoy other persons. In contrast however the ordinance could properly be applied to prohibit the gathering of persons in the mouths of alleys to annoy passers-by by throwing rocks or by some other conduct not at all connected with speech."

As said before, the New Orleans ordinance does not suffer from the faults of the Cincinnati ordinance. The conduct prohibited is clear; the standard of such conduct is specific.

Cohen v. California, supra, held that "absent a more particularized and compelling reasons for its actions, the State may not make the simple public display here involved of the single four letter word explicative a criminal offense". The case involved the appellant wearing a jacket bearing the words "Fuck the Draft" in the corridor of the Los Angeles courthouse. In the case at bar, the conduct of appellant was not the passive display of the controversive words as it was in *Cohen*. Here the appellant addressed the obscenities directly toward the policeman. In the *Cohen* opinion, Mr. Justice Harlan said Id at p. 20, "While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion in the instance it was clearly not 'directed to the person of the hearer' ". *Cantwell v. Connecticut*, supra, at p. 309.

CONCLUSION

It is therefore contended that due to prior decision of this Court and to the particularized scope of Section 49-7 of the Code of the City of New Orleans where wanton cursing and reviling must occur while in the performance of his duty and to the construction of this ordinance as given by the Supreme Court of Louisiana, that the ordinance is not vague and overbroad as contended by appellant and is not in violation of the Constitution of the United States.

Respectfully submitted,

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PARISH OF ORLEANS

I, Servando C. Garcia, III, attorney of record for the City of New Orleans, appellee herein, being duly sworn do depose and say that on the 10th day of September, 1973, I served a copy of the foregoing typewritten brief on Mallie Lewis by mailing copies of same, postage prepaid to

John Wilson Reed
2735 Tulane Avenue
New Orleans, Louisiana 70119

All parties required to be served have been served.

/s/ SERVANDO C. GARCIA, III
SERVANDO C. GARCIA, III
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Sworn to and subscribed
before me this 10th day
of September, 1973.

/s/ ROBERT H. BELKNAP
NOTARY PUBLIC

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LEWIS *v.* CITY OF NEW ORLEANS

APPEAL FROM THE SUPREME COURT OF LOUISIANA

No. 72-6156. Argued December 10, 1973—
Decided February 20, 1974

On remand from this Court for reconsideration in light of *Gooding* v. *Wilson*, 405 U. S. 518, appellant's conviction of violating a New Orleans ordinance making it unlawful "to curse or revile or to use obscene or opprobrious language toward or with reference to" a police officer while in performance of his duties was again sustained by the Louisiana Supreme Court, which did not narrow or refine the words of the ordinance although stating that it was limited to "fighting words" uttered to specific persons at a specific time. *Held:* The ordinance, as thus construed, is susceptible of application to protected speech, and therefore is overbroad in violation of the First and Fourteenth Amendments and facially invalid. The ordinance plainly has a broader sweep than the constitutional definition of "fighting words" as being words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572; *Gooding* v. *Wilson*, *supra*, at 525, since, at the least, "opprobrious language" embraces words that do not fall under that definition, the word "opprobrious" embracing words "conveying or intended to convey disgrace," *Gooding* v. *Wilson*, *supra*. It is immaterial whether the words appellant used might be punishable under a properly limited ordinance. Pp. 2-4

263 La. 809, 269 So. 2d 460, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, [illegible]ITE, and MARSHALL, JJ., joined. POWELL, J., filed an opinion concurring in the result. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LEWIS v. CITY OF NEW ORLEANS

APPEAL FROM THE SUPREME COURT OF LOUISIANA

No. [illegible]. Argued [illegible], 1974

Decided [illegible], 1974

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-6156

Mallie Lewis, Appellant, v. City of New Orleans. } On Appeal from the Supreme Court of Louisiana.

[February 20, 1974]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Upon the Louisiana Supreme Court's reconsideration of this case in light of *Gooding* v. *Wilson*, 405 U. S. 518 (1972), pursuant to our remand, 408 U. S. 913 (1972), that court, three judges dissenting, again sustained appellant's conviction upon a charge of addressing spoken words to a New Orleans police officer in violation of New Orleans Ordinance 828 MCS, § 49-7, 263 La. 809, 269 So. 2d 450 (1972).[1] We noted probable jurisdiction,

[1] On January 3, 1970, appellant and her husband were in their pick-up truck following a police patrol car that was taking their young son to a police station after his arrest. An Officer Berner in another patrol car intercepted and stopped the truck. Berner left his car and according to his testimony, asked the husband for his driver's license. Words were exchanged between Berner and appellant and Berner arrested appellant on a charge of violating § 49-7. The parties respective versions of the words exchanged were in sharp contradiction. Berner testified that appellant left the truck and "started yelling and screaming that I had her son or did something to her son and she wanted to know where he was . . . . She said, 'you god damn m. f. police—I am going to [the Superintendent of Police] about this.'" App. p. 8. Appellant's husband testified that Berner's first words were "let me see your god damned license. I'll show you that you can't follow the police all

412 U. S. 926 (1973), and we reverse. We hold that § 49–7, as construed by the Louisiana Supreme Court, is overbroad in violation of the First and Fourteenth Amendments and is therefore facially invalid. Section 49–7 provides:

> "It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duties."

The Louisiana Supreme Court on remand did not refine or narrow these words, but took them as they stood: "The proscriptions are narrow and specific—wantonly cursing, reviling, and using obscene or opprobrious language." 263 La., at 827, 269 So. 2d, at 456. Nonetheless, that court took the position that, as written, "it [§ 49–7] is narrowed to 'fighting words' uttered to specific persons at a specific time . . . ." 263 La., at 826, 269 So. 2d, at 456. But § 49–7 plainly has a broader sweep than the constitutional definition of "fighting words" announced in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942), and reaffirmed in *Gooding* v. *Wilson*, *supra*, at 523, namely, ". . . those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace." That the Louisiana Supreme Court contemplated a broader reach of the ordinance is evident from its emphasis upon the City's justification for regulation of "the conduct of any person towards a member of the city police while in the actual perform-

---

over the street; . . . After [appellant] got out and said, 'Officer I want to find out about my son.' He said 'you get in the car woman. Get your black ass in the god damned car or I will show you something.'" App. p. 27. Appellant denied that she had used "any profanity toward the officer." App. p. 37. The Municipal Judge credited Berner's testimony and disbelieved appellant and her husband.

ance of his duty . . . . Permitting the cursing or reviling of or using obscene or opprobrious words to a police officer while in the actual performance of his duty would be unreasonable and basically incompatible with the officer's activities and the place where such activities are performed." 263 La., at —, 269 So. 2d, at —.[2]

At the least, the proscription of the use of "opprobrious language," embraces words that do not "by their very utterance inflict injury or tend to incite an immediate breach of the peace." That was our conclusion as to the word "opprobrious" in the Georgia statute held unconstitutional in *Gooding* v. *Wilson*, where we found that the common dictionary definition of that term embraced words "conveying or intended to convey disgrace" and therefore that the word was not limited to words which "by their very utterance inflict injury or tend to invite an immediate breach of the peace." *Ibid.* The same conclusion is compelled as to the reach of the word in § 49–7, for we find nothing in the opinion of the Louisiana Supreme Court that makes any meaningful attempt to limit or properly define—as limited by *Chaplinsky* and *Goding*—"opprobrious," or indeed any other term in § 49–7. In that circumstance it is immaterial whether the words appellant used might be punishable under a properly limited statute. We reaffirm our holding in *Gooding* v. *Wilson*, *supra*, pp. 520–521, in this respect:

"It matters not that the words [appellant] used might have been constitutionally prohibited under

[2] We have no occasion in light of the result reached to address the conflict between this view and that of the framers of the Model Penal Code that suggests that even "fighting words" as defined by *Chaplinsky* should not be punished when addressed to a police officer trained to exercise a higher degree of restraint than the average citizen. See Model Penal Code § 250.1, Comments 14 (Tent. Draft No. 13, 1961).

a narrowly and precisely drawn statute. At least when statutes regulate or proscribe speech and when 'no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution,' . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity' . . . . This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression."

In sum, § 49–7 punishes only spoken words. It can therefore withstand appellant's attack upon its facial constitutionality only if, as authoritatively construed by the Louisiana Supreme Court, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments. *Cohen* v. *California*, 403 U. S. 15, 18–22 (1971); *Terminiello* v. *Chicago*, 337 U. S. 1, 4–5 (1949); *Gooding* v. *Wilson*, *supra*, at 520. Since § 49–7, as construed by the Louisiana Supreme Court, is susceptible of application to protected speech, the section is constitutionally overbroad and therefore is facially invalid.

The judgment of the Louisiana Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 72-6156

Mallie Lewis,
Appellant,
v.
City of New Orleans.

On Appeal from the Supreme Court of Louisiana.

[February 20, 1974]

MR. JUSTICE POWELL, concurring in the result.

I previously concurred in the remand of this case, 408 U. S. 913 (1972), but only for reconsideration in light of *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). Pursuant to the remand order, we now have the Louisiana Supreme Court's decision construing New Orleans Ordinance 828 MCS § 49-7. I agree with the Court's conclusion today that the Louisiana Supreme Court "did not refine or narrow the words [of the ordinance], but took them as they stood." *Ante*, at 2. In conclusory language, that court construed the ordinance to create a *per se* rule: Whenever "obscene or opprobrious language" is used "toward or with reference to any member of the city police while in the actual performance of his duties," such language constitutes "fighting words" and hence a violation without regard to the facts and circumstances of a particular case. As so construed, the ordinance is facially overbroad.

Quite apart from the ambiguity inherent in the term "opprobrious," words may or may not be "fighting words" depending upon the circumstances of their utterance. It is unlikely, for example, that the words said to have been used here would have precipitated a physical confrontation between the middle-aged woman who spoke them and the police officer in whose presence they were uttered. The words may well have conveyed anger and frustration without provoking a violent reaction

from the officer. Moreover, as noted in my previous concurrence, a properly trained officer may reasonably be expected to "exercise a higher degree of restraint" than the average citizen, and thus be less likely to respond belligerently to "fighting words." 408 U. S., at 913. See Model Penal Code § 250.1, Comments 14 (Tent. Draft No. 13, 1961).

This ordinance, as construed by the Louisiana Supreme Court, confers on police a virtually unrestrained power to arrest and charge persons with a violation. Many arrests are made in "one-on-one" situations where the only witnesses are the arresting officer and the person charged. All that is required for conviction is that the court accept the testimony of the officer that obscene or opprobious language had been used toward him while in performance of his duties.* Indeed, the language need not be addressed directly to the officer since the ordinance is violated even if the objectionable language is used only "with reference to any member of the city police."

Contrary to the City's argument, it is unlikely that limiting the ordinance's application to genuine "fighting words" would be incompatible with the full and adequate performance of an officer's duties. In arrests for the more common street crimes (*e. g.*, robbery, assault, disorderly conduct, resisting arrest), it is usually unnecessary that the person also be charged with the less serious offense of addressing obscene words to the officer. The present type of ordinance tends to be invoked only where there is no other valid basis for arresting an objectionable or suspicious person. The opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.

I therefore concur in the result.

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*The facts in this case, and particularly the direct conflict of testimony as to "who said what," well illustrate the possibility of abuse. *Ante*, p. 1, n. 1.

SUPREME COURT OF THE UNITED STATES

No. 72-6156

Mallie Lewis,
Appellant,
v.
City of New Orleans.

On Appeal from the Supreme Court of Louisiana.

[February 20, 1974]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

Mr. Justice Holmes aptly observed:

> "All rights tend to declare themselves absolute to their logical extreme." *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908).

The extremes to which we allow ourselves to be manipulated by theory extended to the end of logic is exemplified by the Court's opinion in this case and in its blood brother of two years ago, *Gooding* v. *Wilson*, 405 U. S. 518 (1972). The "overbreadth" and "vagueness" doctrines, as they are now being applied by the Court, quietly and steadily have worked their way into First Amendment parlance much as substantive due process did for the "old Court" of the 20's and 30's. These doctrines are being invoked indiscriminately without regard to the nature of the speech in question, the possible effect the statute or ordinance has upon such speech, the importance of the speech in relation to the exposition of ideas, or the purported or asserted community interest in preventing that speech. And it is no happenstance that in each case the facts are relegated to footnote status, conveniently distant and in a less disturbing focus. This is the compulsion of a doctrine that reduces our function to parsing words in the context of imaginary events. The result is that we are not merely applying con-

stitutional limitations, as was intended by the Framers, and, indeed, as the history of our constitutional adjudication indicates, but are invalidating state statutes in wholesale lots because they "conceivably might apply to others who might utter other words." *Gooding* v. *Wilson*, *supra*, 405 U. S., at 535 (dissenting opinion).

The application of this elliptical analysis to *Gooding* and to this case is instructive. In *Gooding*, officers were attempting to restore public access to a building when they were met by physical resistance and loud, personal abuse: "White son of a bitch, I'll kill you," "You son of a bitch, I'll choke you to death," and "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." The defendant was convicted under a Georgia statute which provided that any person "who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." The Court seized upon dictionary definitions and language of Georgia court decisions from the turn of the century. It concluded that the statute swept beyond the bounds of the "fighting words" limitation of *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), despite the fact that the language of the statute virtually tracked the language used by the *Chaplinsky* Court to describe words properly subject to some regulation, and without any demonstration in reason how "the narrow language of the Georgia statute has any significant potential for sweeping application to suppress or deter important protected speech." 405 U. S., at 529 (BURGER, C. J., dissenting).

In the present case, appellant and her husband were stopped by a police officer. Appellant's and the officer's respective versions of the incident are conflicting, but the municipal judge credited the officer's testimony. That finding, of course, on this record, is binding upon

us. The officer testified that while he was waiting for appellant's husband to produce his driver's license, appellant came out of their truck "and started yelling and screaming that I had her son or did something to her son and she wanted to know where he was. I said 'lady, I don't have your son and I am not talking to you. I am talking to this man and you can go sit in the truck.' She said 'you god damn m. f. police—I am going to Giarrusso [the police superintendent] to see about this.' I said 'lady you are going to jail—you are under arrest.' She said 'you're not taking me to jail' and she started to get back in the cab of the truck and I caught up to her while she was getting in the cab. I attempted to take her and she started fighting and swinging her arms." App. 8. A fight ensued and appellant was subdued with the help of another officer. Appellant was charged with resisting arrest and with wantonly reviling the police. She was convicted on both charges but appealed only the conviction of wantonly reviling the police.

We remanded this case to the Supreme Court of Louisiana to construe the meaning of the ordinance.[1] 408 U. S. 913 (1972). That court, after reviewing the applicable precedents, including *Chaplinsky* and *Gooding*, specifically construed the ordinance as "not offensive to protected speech; it is narrowed to 'fighting words' uttered to specific persons at a specific time; it is not overbroad and is therefore not unconstitutional . . . . Any reasonable man knows what it is to wantonly curse or revile . . . . *The Section definitely does not sweep within its proscriptions all forms of abusive and deroga-*

[1] "Section 49-7. *Cursing, etc., police prohibited.*

"It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty."

tory speech." 263 La. 809, 826–827, 269 So. 2d 450, 456 (emphasis in original).

Again, setting the facts to one side, this Court selectively dissects the wording of the Louisiana Supreme Court opinion, eyes the word "opprobrious," refers us to its treatment of "opprobrious" in *Gooding*, observes that "49–7 plainly has a broader sweep than the constitutional definition of 'fighting words' announced in *Chaplinsky*," *ante* 2, and concludes that "we find nothing in the opinion of the Louisiana Supreme Court that makes any meaningful attempt to limit or properly define—as limited by *Chaplinsky* and *Gooding*—'opprobrious' or indeed any other term in § 49–7." *Ante* 3. And again, the ordinance is struck down with no discussion of whether it might significantly affect protected speech, and no reasons why the State's interest in public peace and the harmonious administration of its laws should not prevail over a lone, individual claim that the statute is unconstitutional as applied to others. I cannot reconcile what the Court says with what the Louisiana Supreme Court has said. I believe my Brethren of the majority merely seek a result here, just as I was convinced they sought a result in *Gooding*.

Mr. Justice Jackson warned of the dangers of this kind of constitutional analysis:

> "But I did not suppose our function was that of a council of revision. The issue before us is whether what has been done has deprived this appellant of a constitutional right. It is the law as applied that we review, not the abstract, academic questions which it might raise in some more doubtful case." *Saia* v. *New York*, 334 U. S. 558, 571 (1948) (dissenting opinion).

Overbreadth and vagueness in the field of speech, as the present case and *Gooding* indicate, have become result-

oriented rubberstamps attuned to the easy and imagined self-assurance that "one man's vulgarity is another's lyric." *Cohen* v. *California*, 403 U. S. 15, 25 (1971). The danger is apparent. Inherent in the use of these doctrines and this standard is a judicial-legislative confrontation. The more frequent our intervention, which of late has been unrestrained, the more we usurp the prerogative of democratic government. Instead of applying constitutional limitations, we do become a "council of revision." If the Court adheres to its present course, no state statute or city ordinance will be acceptable unless it parrots the wording of our opinions.

This surely is not what the Framers intended and this is not our constitutional function. I would adhere to what Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench in *Chaplinsky*, *supra*, 315 U. S., at 571–572:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of

information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell* v. *Connecticut*, 310 U. S. 296, 309–310." (Footnotes omitted.)

The speech uttered by Mrs. Lewis to the arresting officer "plainly" was profane, "plainly" it was insulting, and "plainly" it was fighting. It therefore is within the reach of the ordinance, as narrowed by Louisiana's highest court. The ordinance, moreover, poses no significant threat to protected speech. And it reflects a legitimate community interest in the harmonious administration of its laws. Police officers in this day perhaps must be thick-skinned and prepared for abuse, but a wanton, high velocity, verbal attack often is but a step away from violence or passioned reaction, no matter how self-disciplined the individuals involved. In the interest of the arrested person who could become the victim of police overbearance, and in the interest of the officer, who must anticipate violence and who, like the rest of us, is fallibly human, legislatures have enacted laws of the kind challenged in this case to serve a legitimate social purpose and to restrict only speech that is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky*, *supra*, at 572.[2] In such circumstances we should stay our hand and not yield to the absolutes of doctrine.

I see no alternative to our affirmance, and I therefore dissent.

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[2] The suggestion that the ordinance is open to selective enforcement is no reason to strike it down. Courts are capable of stemming abusive application of statutes. See, *e. g.*, *Norwell* v. *City of Cincinnati*, 414 U. S. 14 (1973). Questions of credibility, moreover, have been resolved by courts for centuries and there is no reason to believe the so-called modern age requires any different treatment.